146 U.S. 842

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 260.

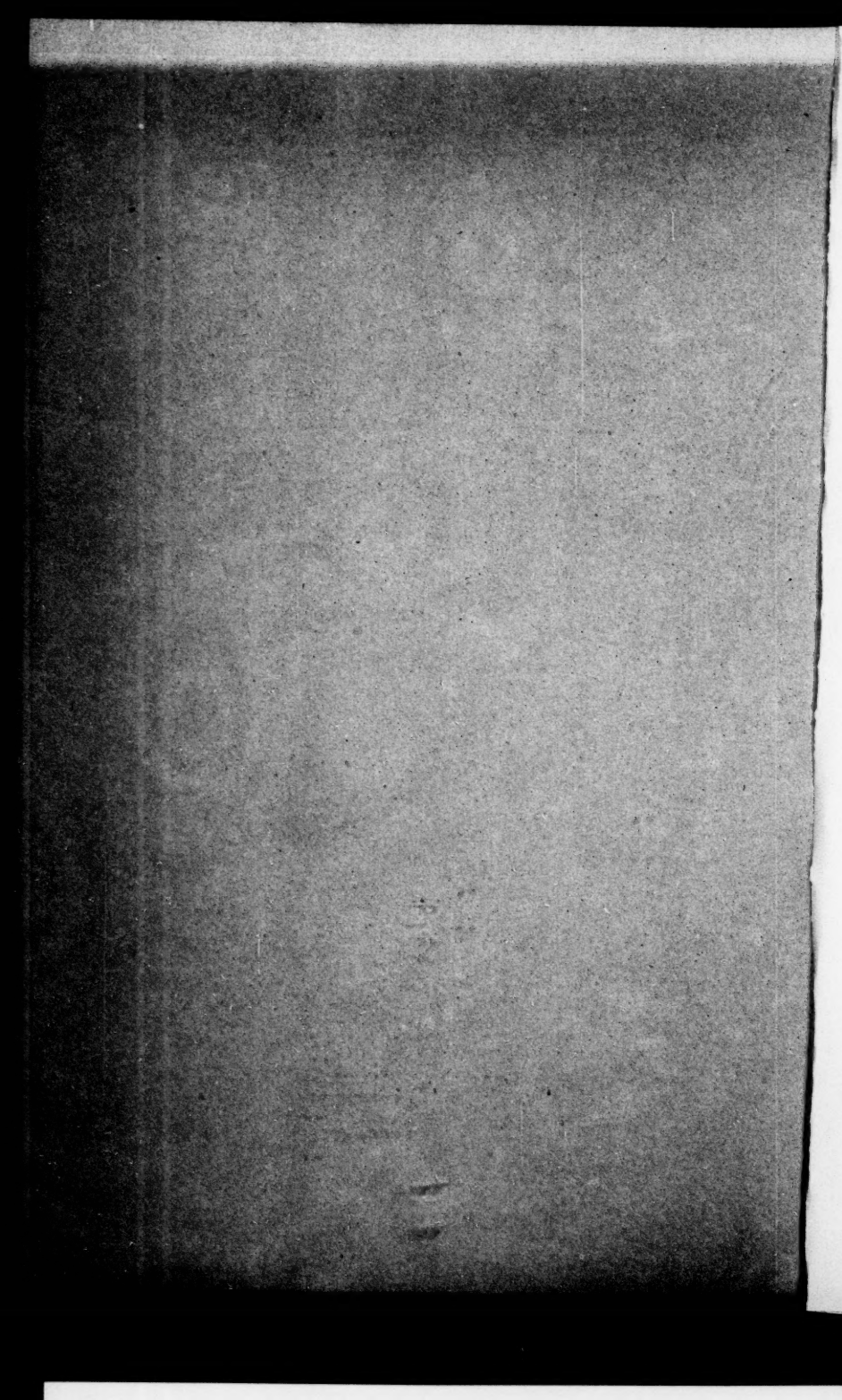
E. VAN WINKLE & COMPANY, PLAINTIFFS IN ERROR,

vs.

CANTY CROWELL, LEHMAN, DURR & COMPANY, AND POLLAK & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

FILED OCTOBER 17, 1888.



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a November Term, A. D. 1887.

At a circuit court of the United States for the middle district of Alabama, in the fifth judicial circuit, begun and holden at Montgomery, Alabama, on the first Monday in November, it being the seventh day of said month, in the year of our Lord one thousand eight hundred and eighty-seven—present and presiding, the Honorable John Bruce, judge of the district courts of the United States for the middle and northern districts of Alabama, sitting as circuit judge, Wednesday, November 23, 1887, a day of said term—the following proceedings were had:

1 *Transcript from Circuit Court of Bullock County.*

THE STATE OF ALABAMA, }
Bullock County. }

Before D. M. Collins, clerk of the circuit court in and for said county, personally appeared J. M. White, agent and attorney for E. Van Winkle & Co., plaintiffs, who, being duly sworn, deposeth and saith that the property sued for in the complaint of E. Van Winkle and Co. *vs.* —— ——, to wit, one certain lot of oil mill and gin machinery, fixtures, and appurtenances, particularly described in the complaint hereto attached, belongs to E. Van Winkle & Co., the said plaintiffs.

J. M. WHITE.

Sworn to and subscribed before me this eight- day of November, 1886.

DANIEL M. COLLINS,
Clerk Circuit Court.

Detinue Bond.

THE STATE OF ALABAMA, }
Bullock County. }

Know all men by these presents that we, E. Van Winkle & Co. and J. M. White and John D. Roquemore, are held and firmly bound unto Canty Crowell in the sum of two hundred dollars, to be paid to the said Canty Crowell, his heirs, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severrally and firmly by these presents.

Sealed with our seals and dated the 8th day of November, in the year of our Lord one thousand eight hundred and eighty-six.

The condition of the above obligation is such that whereas the above-bound E. Van Winkle & Co., on the day of the date hereof, hath obtained at the suit of themselves, by agent, a summons and complaint for the recovery of personal chattels in specie against said Canty Crowell, and asks an endorsement by the clerk of this court

"that the sheriff to take the property mentioned in the said complaint into his possession," as required by law in such cases, which summons and complaint are returnable to the next term of the circuit court for said county, and which said endorsement is made upon the plaintiffs entering into this bond:

Now, if the said plaintiffs shall fail in this suit and shall pay the defendant all such costs and damages as he may sustain by reason of the wrongful complaint in said case, then this obligation to be void; otherwise to remain in full force and effect.

E. VAN WINKLE & CO., [L. S.]
By J. M. WHITE.
J. M. WHITE. [L. S.]
JOHN D. ROQUEMORE. [L. S.]

Approved this 8th day of November, 1886.

DANIEL M. COLLINS,
Clerk Circuit Court.

Summons.

THE STATE OF ALABAMA, }
Bullock County. }

To any sheriff of Alabama, Greeting:

You are hereby commanded to summon Canty Crowell to appear at the next term of the circuit court to be held for said county, at Union Springs, the place of holding the same, then and there to answer the complaint of E. Van Winkle & W. W. Boyd, partners in
2 trade, using the firm name and style of E. Van Winkle & Co.

Witness my hand and seal this 8th day of November, one thousand eight hundred and eighty-six.

DANIEL M. COLLINS, *Clerk.*

Complaint.

THE STATE OF ALABAMA, }
Bullock County. }

In the Circuit Court of Bullock County.

E. VAN WINKLE & W. W. BOYD, Partners in Trade, Using Firm Name and Style of E. Van Winkle & Co., Plaintiffs,
vs.
CANTY CROWELL, Defendant.

The plaintiffs claim of the defendant the following personal property, to wit: One certain lot of oil mill and gin machinery, fixtures, and appurtenances, definitely described as follows: Three, (70) seventy saws each, Van Winkle gins, with self-feeders and condensers; one cotton elevator for elevating cotton to gins, two Van Winkle cotton presses, one line shaft underneath gin-house for driving

gins and presses, 2½ inches in diameter, with the pulleys and boxes and couplings attached; one line shafting connecting between engine in oil-mill building to line shaft underneath the gin-house, with connecting boxes, boltings, and couplings; one main line of shafting on first floor of oil-mill building, 3 x 2½ inches in diameter, with all connecting hangers, pulleys, couplings, bolts, and stringers, with belting connected to machines operated by this shaft; four Van Winkle cotton-seed oil presses, four Van Winkle steam-heaters, with connecting frames, conveyors, shafting, pulleys, and bolts attached; forty-eight steel-plated mats, forty-eight sheet-plated mats, one cake-former, one cake-compresser and attachments, one hydraulic pump and connecting oil pipes to presses and belting for pump, one oil pump for tanks and connecting pipes, one iron oil tank, two wooden oil tanks, four elevators and belting and connections from ground floor to second floor, one cake-grinding mill (Nonpareil pattern, O. B.), two Van Winkle hullers, with connecting belting and conveyors; one sett crushing rollers, with connections and iron meal buckets; one cake-breaking machine and connections, one sand screen, with shaker and blower attachments, and belting and pulleys connected therewith; lot of oil and steam pipes to heaters and tanks, four Van Winkle cotton-seed linters, with self-feeders and condensers (80 saws each), with two iron conveyors and boxing attached to same and the belting connected therewith; one double belting reel, with two conveyors for seed and hulls, and attached pulleys and belting; the pulleys, belting, and shafting connected with linters and separators in second story; one emory wheel, four setts hulling knives, and one 48 x 16 inches pulley on ground floor, with boxes and bolts attached; all of which machinery is or has lately been situated in the cotton-seed oil mill and ginnery at Mitchell station, on the M. & E. R. R., known as Belser & Parker's mill, with the value of the hire thereof during the detention, viz., from the — day of ——, 1886.

3 ROQUEMORE, WHITE & LONG,
Att'ys for Plaintiffs.

Plaintiffs being non-residents, we bind ourselves as security for costs.

ROQUEMORE, WHITE AND LONG.

Approved Nov. 8th, 1886.

DANIEL M. COLLINS,
Circuit Clerk.

The plaintiffs having made affid-vit and given bond as required by section 2942 of the Code, the sheriff will take into his possession the property described in the complaint, unless the defendant give bond, payable to the plaintiffs, with sufficient surety, in double the amount of the value of the property, conditioned as prescribed by said section 2942 of the Code of Alabama.

DANIEL M. COLLINS,
Clerk Circuit Court.

Received in office 8th November, 1886.

C. M. McREA, *Sheriff.*

Executed by taking into my possession the within-described property November 9th, 1886, and also executed by serving a copy of the within summons and complaint on the defendant this the 9th day of November, 1886.

C. M. McRAE, *Sheriff.*

Defendant's Replevy Bond in Detinue.

THE STATE OF ALABAMA, }
Bullock County. }

Know all men by these presents that we, Canty Crowell, Lehman, Durr and Co., John W. Durr, and Joseph Goetter, and Ignatius Pollak, are held and firmly bound unto E. Van Winkle & Co. in the sum of twenty thousand dollars; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this the 15th day of November, A. D. 1886.

The condition of the above obligation is such that whereas the above-named E. Van Winkle and Co. have commenced an action of detinue against said Canty Crowell by issuing writ *capias ad respondendum* in detinue from the circuit court of said county and State on the 8th day of November, A. D. 1886, by which, together with the endorsements thereon, *and* the sheriff of the State of Alabama was commanded to take into his possession the following-described property, to wit:

Three, seventy saws each, Van Winkle gins, with self-feedere and condensers; one cotton elevator for elevating cotton to gins, two Van Winkle cotton presses, one line shaft underneath gin-house for driving gins and presses, two and one-half inches in diameter, with pulleys, boxes, and couplings attached; one line shafting connecting between oil-mill building to line shaft underneath gin-house, with connecting boxes, boltings, and couplings; one main line of shafting on first floor of oil-mill building three by two and one-half inches in diameter, with all the connecting hangers,
4 pulleys, couplings, bolts, and stringers, with belting connected to machines operated by this shaft; four Van Winkle cotton-seed oil presses, four Van Winkle steam-heaters, with connecting frames, conveyors, shafting, pulleys, and belts attached; forty-eight steel-plated mats, forty-eight sheet-plated mats, one cake-former, one cake-compresser and attachments, one hydraulic pump and connecting oil pipes to presses and belting for pumps, one oil pump for tanks and connecting pipes, one iron oil tank, two wooden oil tanks, four elevators and belting and connections from ground floor to second floor, one cake-grinding mill (Nonpareil pattern, O. B.), two Van Winkle hullers, with connecting belting and conveyors; one set of crushing rollers, with connections and iron meal

buckets; one cake-breaking machine and connections, one sand screen and shaker and blower attachments and belting and pulley connected therewith; lot of oil, steam-pipes to heaters and tanks, four Van Winkle cotton-seed linters, with self-feeders and condensers (80 saws each), with two iron conveyors and boxing attached to same and belting connected therewith; one double-belting reel, with two conveyors for seed and hulls and attached pulleys and belting, the pulleys, belting, and shafting connected with linters and separators in second story; one emory wheel, four setts of hulling knives, one forty-eight by sixteen inches pulley on ground floor, with boxes and bolts attached; all of which machinery is or has lately been situated in the cotton-seed oil mill and ginnery at Mitchell's station on the M. & E. R. R., known as Belser and Parker's mill.

Which said writ was, on the 9th day of November, A. D. 1886, placed in the hands of C. M. McRae, sheriff of said county, for due execution thereof, and which said writ said C. M. McRae, sheriff as aforesaid, executed according to its mandates by taking possession of all of said property hereinabove described. And whereas the said Canty Crowell, defendant in said suit, has made application to said C. M. McRae, as sheriff as aforesaid, to give bond and take possession of said property as authorized by law—

Now, therefore, if the said Canty Crowell, defendant in said suit, shall deliver the above-described property to said E. Van Winkle and Co., plaintiffs in said suit, within thirty days after judgment, in case he shall be cast in said suit, together with damages for the detention of property and costs of suit, then and in that event this obligation to be void; otherwise to remain in full force and effect.

CANTY CROWELL. [L. S.]
LEHMAN, DURR AND CO. [L. S.]
JOHN W. DURR. [L. S.]
JOS. GOETTER. [L. S.]
IGNATIUS POLLAK. [L. S.]

Witness:
J. W. WOOLFOLK.

Approved this 15th day of Nov., 1886.

C. M. McRAE,
Sheriff of Bullock County, Alabama.

5 *Notice to Claimants.*

E. VAN WINKLE
vs.
CANTY CROWELL.

To Canty Crowell, Messrs. Lehman, Durr & Co., E. Van Winkle & Co., Pollak & Co.:

You will please take notice that on, to wit, the eight- day of November, 1886, E. Van Winkle & Co. commenced their suit in detinue in the circuit court of Bullock county, Alabama, and against Canty

Crowell, to recover of him the possession of a certain lot of oil-mill and gin machinery, fixtures, and appurtenances in the cotton-seed oil mill and ginnery at Mitchell's station, on the M. & E. R. R., known as Belser and Parker's mill, in Bullock county, Alabama—machinery, fixtures, and appurtenances particularly enumerated and named in the complaint in said cause; that on the same day, said plaintiffs having made the proper affidavit and given bond as required by law in such cases, the clerk of said court, by writing endorsed on the summons in said cause, required the sheriff of said county to take the property mentioned in said complaint into his possession unless the said defendant give bond payable to said plaintiff, with sufficient surety in double the value of said property, with conditions that if the defendant is cast in the suit he will, within thirty days thereafter, deliver the property to the plaintiff and pay all costs and damages which may accrue from the detention thereof; that on the ninth day of November, 1886, said sheriff seized said property under said writ and is now in possession of the same under and by virtue of said seizure and claims no title thereto, but has been notified that said Canty Crowell, E. Van Winkle & Co., and said Lehman, Durr and Co. & Pollak and Co. claim title thereto adversely to each other. These are therefore to demand that said claimants litigate among themselves the title to said property this November 13th, 1886.

C. M. McRAE,
Sheriff of Bullock County, Alabama.

Executed by serving the within notice on the within parties November 13, 1886.

C. M. McRAE, *Sheriff.*

E. VAN WINKLE & Co.
vs.
CANTY CROWELL.

Petition for Removal to U. S. Circuit Court. Filed in Office February 18th, 1887. D. M. Collins, Clerk, &c.

In the Circuit Court of Bullock County, State of Alabama, February Term of said Court.

E. VAN WINKLE & Co.
vs.
CANTY CROWELL.

To the Hon. Jesse Carmichael, judge of the third judicial circuit of Alabama:

Your petitioner, Canty Crowell, respectfully represents and states unto your honor that he is a resident citizen of the middle district of Alabama and is defendant in the above-entitled cause; that E. Van Winkle and W. W. Boyd, partners in trade using the
6 firm name and style of E. Van Winkle & Co., the plaintiffs in the above-entitled cause, are resident citizens of the State

of Georgia; that the plaintif-s were on the 8th day of November, 1889, and still are citizens of the said State of Georgia, and that petitioner was on the said eight- day of November, 1886, and ever since has continuously remained such resident citizen of said middle district of Alabama; that on said eight- day of *of* November, 1886, said plaintiffs instituted an action of detinue in said circuit court of Bullock county, State aforesaid, against petitioner, as defendant as aforesaid, for the recovery of certain property in the complaint in said action particularly mentioned and described; that the said matter in dispute or controversy is between citizens of different States, and that the amount in controversy, exclusive of costs of court, exceeds the sum of five hundred dollars.

Wherefore, the premises considered, your petitioner prays your honor to make an order removing said cause to the circuit court of the United States for the middle district of Alabama upon your petitioner's entering into bond in such sum as your honor may determine, conditioned as required by the statute of the United States in such cases made and provided; and as in duty bound your petitioner will ever pray, &c.

TROY, TOMPKINS AND LONDON,
RICE AND WILEY,
Att'ys for Petitioner, Canty Crowell.

THE STATE OF ALABAMA, }
County of Bullock. }

Before me, D. M. Collins, clerk of the circuit court of Bullock county, State aforesaid, personally appeared Canty Crowell, who, being duly sworn, desposes and says that the averments and allegations set forth and contained in the foregoing petition are true to the best of his knowledge, information, and belief.

CANTY CROWELL.

Sworn to and subscribed before me this the 18th day of Feb., A. D. 1887.

D. M. COLLINS, *Clerk, &c.*

E. VAN WINKLE & CO. }
vs.
CANTY CROWELL. }

Bond on Removal to U. S. Court. Filed in Office February 18th 1887. D. M. Collins, Clerk, &c.

STATE OF ALABAMA, }
Bullock County. }

Know all men by these presents that we, Canty Crowell, Lehman, Durr and Co., S. Roman, and Ignatius Pollak, are held and firmly bound unto E. Van Winkle & Co. in the penal sum of five hundred dollars; for the payment of which sum we and each of us, our and each of our heirs and legal representatives, are held and firmly bound.

Signed and sealed this 18th day of February, 1887.

The conditions of the above obligation are these: That whereas the said E. Van Winkle & Co. have commenced a suit in detinue against the above-bound Canty Crowell for the recovery of certain property, in said complaint filed in said cause set forth and described, returnable to the circuit court of said Bullock county to the February term, 1887, thereof, which is still pending therein;

7 and whereas the said Crowell has this day, upon an application filed by him, obtained an order removing said cause to the circuit court of the United States for the middle district of Alabama, at Montgomery, Alabama:

Now, therefore, if said Canty Crowell shall enter into said circuit court of the United States on the first day of its next session a copy of the record of such suit and shall pay all costs that may be awarded by said circuit court, if said circuit court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void and of no effect; otherwise to remain in full force and effect.

CANTY CROWELL. [SEAL.]
LEHMAN, DURR & CO. [SEAL.]
S. ROMAN. [SEAL.]
IGNATIUS POLLAK, [SEAL.]
By A. A. WILLEY, *Att'y-in-Fact.*

STATE OF ALABAMA, }
Bullock County. }

I, D. M. Collins, clerk of the circuit court *court* of the county aforesaid, do hereby certify that the foregoing pages from one to seventeen, inclusive, contain a full and complete transcript of the record and proceedings of the said circuit court of said Bullock county in a case therein pending wherein E. Van Winkle & Co. was plaintiff and Canty Crowell defendant.

Witness my hand this 12th day of May, 1887.

DANIEL M. COLLINS,
Clerk Circuit Court, Bullock County, Alabama.

Filed Nov. 11, A. D. 1887, in open court.
J. W. DIMMICK, *Clerk.*

In the Circuit Court of the United States for the Middle District of Alabama.

FRIDAY, *November* 18*th*, 1887.

Present: The Hon. John Bruce, one of the judges of said court.

The following proceedings were had:

Order Granting Leave to Lehman, Durr & Co. & Pollak & Co. to Come in & Make Themselves Parties Def't.

E. VAN WINKLE & Co.
vs.
CATY CROWELL. } No. 656.

Upon motion of counsel for Lehman, Durr & Co. and Pollak and Co. they are allowed to come in and make themselves parties defendants to this suit and file their pleas. Thereupon came a jury of twelve good and lawful men, to wit, C. B. Ferrell and eleven others, who were duly empanelled and sworn well and truly to try the issue joined between the parties and a true verdict render according to the evidence.

8 SATURDAY, *November* 19*th*, 1887.

Court met pursuant to adjournment.
Present: As on yesterday.

E. VAN WINKLE & Co.
vs.
CANTY CROWELL & Others.

This cause came on further to be heard this day and also came the jury heretofore empanelled and sworn. During the trial of the case court adjourned until Monday at ten o'clock.

MONDAY, *November* 21*st*, 1887.

Court met pursuant to adjournment.
Present: As on yesterday.

E. VAN WINKLE & Co.
vs.
CANTY CROWELL and Others.

During the trial of this cause court adjourned until to-morrow at ten o'clock.

TUESDAY, *November* 22, 1887.

Court met pursuant to adjournment.
Present: As on yesterday.

E. VAN WINKLE & Co.
vs.
CANTY CROWELL *et als.*

In this cause the evidence having been completed on both sides, the case was argued by counsel. The court then charged the jury, after which it was conducted to its room by the marshal.

Judgment.

WEDNESDAY, *November* 23, 1887.

E. VAN WINKLE & Co.
vs.
CANTY CROWELL, LEHMAN, DURR & Co., & POLLAK & Co. } 656.

This cause came on further to be heard this day, and also came the jury heretofore empanelled and sworn, to wit, C. B. Ferrell and eleven others, who, being duly elected, tried, and sworn well and truly to try the issue joined between the parties and a true verdict render according to the evidence, upon their oaths do say: "We, the jury, find for the defendants." It is therefore considered by the court that the said defendants go hence and recover of the said plaintiffs their reasonable costs in this behalf expended, for which execution may issue.

9 *Bill of Exceptions.*

In the Circuit Court of the United States for the Middle District of Alabama.

E. VAN WINKLE & Co.
vs.
CANTY CROWELL, LEHMAN, DURR & Co., & POLLAK & Co. }

Be it remembered that the above cause coming on to be heard the following proceedings were had:

The defendant Crowell, against whom the action was commenced in the State court, having had possession only as a bailor for Lehman, Durr & Co., a firm composed of Emanuel Lehman, Meyer Lehman, Jos. W. Goeter, and John W. Durr, who were mortgagees of the property, and also Pollak and Co., who were also mortgagees, by consent appeared and made themselves parties defendants in the cause.

The plaintiffs introduced evidence tending to show that they were engaged in the business of manufacturing and erecting cotton-seed oil machinery; that their place of business was Atlanta, Georgia; that understanding that a firm doing business at Pike Road, in Montgomery county, Ala., under the name of Belser and Parker, desired to erect cotton-seed oil mill machinery, one of the plaintiffs visited said Belser and Parker in March, 1885, and on the 28th of March, 1885, Belser and Parker gave the plaintiffs the order for all the machinery and appurtenances necessary to operate an oil mill and gin-house of capacity to work thirty tons of cotton seed per day, shown by a copy of the order, Exhibit A, hereto attached as part of this bill.

That the plaintiffs wrote the said order, a copy of which, as a part of this bill of exceptions, is hereto attached, marked Exhibit A, which paper the said Belser and Parker signed and delivered to

plaintiffs and retained a copy thereof for themselves. The plaintiffs stated: "I made no other agreement. I accepted the order to furnish the machinery and erect it." The evidence tended to show that said machinery was to be erected at Mitchell's station, in Bullock county, Alabama, which was a few miles east of Pike Road, on the railroad running from Montgomery by Pike Road and Mitchell station to Eufaula, Alabama, and that Belser and Parker were also doing business at Mitchell's station.

The evidence tended to show that the machinery in question was not kept in stock by plaintiffs, but was manufactured upon orders.

The evidence tended to shaow that upon receiving said writing, of which Exhibit A is a copy, the plaintiffs proceeded to manufacture and ship the machinery mentioned in said Exhibit A to Mitchell's station and sent out mechanics to erect and put the same in operation under terms of the written contract; that said machinery was shipped from Atlanta, consigned under bills of lading to Belser and Parker, and that during the progress of the work Belser and Parker paid plaintiffs $2,500 on plaintiffs' drafts drawn according to the contract.

10 That during the progress of the work and up to the 11th Dec., 1885, the letters and telegrams hereto attached as part of this bill of exceptions (respectively marked B, C, &c., up to and including M) were sent by Belser and Parker to plaintiffs, and the letter (marked O) was sent by plaintiffs to Belser & Parker.

The evidence tended to show that the machinery for ginning and packing cotton was first forwarded, erected, and put into operation; that the other machinery was later in being sent and erected; that it was sufficiently complete by using some temporary parts of machinery to be operated and was operated during the latter part of October and during November of 1885; that up to about the 20th of November one of the plaintiffs' machinists was at said mill adjusting and fixing it properly, and that when he left there, on a telegram to go to a different place, the machinery was not complete, but was in operation by Belser and Parker, and so continued up to the 9th or 10 of December, 1885, when one of the plaintiffs met one of the firm of Belser and Parker in Montgomery and went with him to said mill and inspected the machinery together; and thereupon Belser and Parker insisted and it was agreed between them that certain parts of the machinery should be supplied and others changed, and then Belser and Parker agreed that it should be settled for as follows, viz., by three papers signed by Belser and Parker, of which the following is a copy of the one first due, and the others are identical, except as to amounts and dates of maturity. The reason of fixing the time of notes at different dates from that named in the contract was an agreement to extend payment to the times stated, the plaintiffs being unwilling to take the property as security, but agreed to take the notes for title from Belser and Parker upon their insuring the property as they had theretofore insured it, and they agreed to go to Montgomery and have policies assigned:

$1,500.00. PIKE ROAD, ALA., *Dec. 11th*, 1885.

On or before the first day of February, 1886, we promise to pay to E. Van Winkle & Co. or order fifteen hundred & $\frac{00}{100}$ dollars, for value received, with interest from date until paid at the rate of eight per cent. per annum, and also all costs of collection. The benefit of any and all homestead or exemption laws is waived as to this note. The above is for purchase-money of one cotton-seed oil mill machinery built at Mitchell's station, Ala., which E. Van Winkle and Co. have this day agreed to sell to Messrs. Belser and Parker, of Pike Road, Ala.; and it is the express condition of the delivering of the said property that the title to the same does not pass from E. Van Winkle & Co. until the purchase-money and interest is paid in full.

In testimony whereof — have hereunto set — hands and seal.

Payable at ——.

BELSER & PARKER. [SEAL.]

One of the other of said papers was for $3,500, due on the first of March, 1886, and the other, for $4,633.52, was due on the first of Dec., 1886.

The evidence tended to show that when the above three papers were given said three papers, of which a copy of the first one is above set out, were, upon being signed, delivered to plaintiffs at Pike Road, Ala., the date they bear date and immediately upon the return from the inspection of said machinery at Mitchell's station; that at this time the sum of about $500 was not adjusted nor any note taken therefor, because the said Belser and Parker had paid some freights and incurred some expenses which would to
11 some extent offset a portion or all of the $500, and that was therefore left open for future adjustment when Belser and Parker could get up some bills showing said payments, which were then not at hand.

And the evidence tended to show that such bills amounted to $500.

The evidence tended to show that plaintiffs duly supplied and changed the parts of the machinery which, on said settlement, was stipulated to be supplied or changed, and there was no evidence of any complaint on that score by Belser and Parker.

E. Van Winkle, one of the plaintiffs, testified, as a witness, that the machinery sued for was the machinery so contracted for and manufactured by his firm, and for which said three papers above herein described were given on the 11 of December, 1885, by said Belser and Parker; that no amount of money had ever been paid upon any of said debts shown by said three papers; and that the value of said machinery and of the use or hire thereof from the commencement of the suit was shown in evidence. The value of the machinery was $12,000.00, and hire or use $2,000.00.

The said E. Van Winkle testified that his firm never did turn over said cotton-seed oil mill machinery to said Belser and Parker (otherwise than by shipping the machinery as above stated and by permitting Belser and Parker to operate the same) until upon said settlement after said inspection in Dec., 1885; and that said Belser and

Parker did not prior thereto accept said cotton-seed oil mill machinery as a compliance with the contract, and then only accepted it conditionally upon plaintiffs supplying and changing certain parts of the machinery.

The foregoing evidence of Van Winkle as to turning over the mill and machinery to Belser and Parker and their acceptance of it was admitted against the objection of the defendants, and on their motion was excluded, and to this action of the court the plaintiffs duly excepted

The said plaintiff (E. Van Winkle) testified that the machinery was manufactured under a guarantee, and that he permitted its operation by Belser and Parker in order that it might be fully tested; that the use of such machinery moderately does not impair its value.

The foregoing evidence of Van Winkle that the machinery was manufactured under guarantee, and that he permitted its operation by Belser and Parker to test it, was objected to when offered and excluded on motion of defendants after having been admitted, and to this action of the court the plaintiffs duly excepted.

The said E. Van Winkle and Belser, of the firm of Belser and Parker, both testified that under the terms of the contract for the machinery Van Winkle & Co. were to erect the same; but this evidence was, on motion of the defendants, excluded from the jury on the ground that the writing, of which Exhibit A is a copy, was the evidence of what plaintiffs agreed to do; and to this ruling and action of the court the plaintiffs duly excepted.

The evidence was conflicting as to how said machinery was attached or fastened to the houses or realty; but it was proven that all of it was essential to a cotton-seed oil mill.

The plaintiff introduced evidence tending to show that, excepting in some instances of cleats upon the floor and around the machines to keep the machinery from sliding, and excepting the attachment of shafting by hangers screwed to the building and running loose in boxes, all of which could be unscrewed and detached without
12 injury to the building or machinery, and excepting bands running from pulleys on the shafting to the other pulleys on the machinery, there was no fastening of the machinery to the realty, but that it remained in place of its own weight, and could be taken up and out of the building without detriment, as in the case of furniture.

The defendants introduced evidence tending to show that most all of the machinery was nailed to the house in which it was situated, but the evidence showed that most of the machinery was ponderous and required no fastening to keep it in position.

The evidence showed that the realty in which the machinery was situated was the property of Belser and Parker, and that the machinery was adapted and suited and essential for the purposes for which the building in which it was situated was erected, but the evidence also tended to show that the building might be used for other purposes, but had been erected especially for the purpose of operating this machinery.

Evidence was introduced by the defendants showing that prior to the commencement of this suit the plaintiffs had filed the claim of a builders' or mechanics' lien, as is shown by a copy thereof hereto attached as part of this bill of exceptions, marked Exhibit W, and that afterwards plaintiffs commenced a suit to enforce the same, as is shown by a copy of the record and proceedings in said cause hereto attached as part of this bill of exceptions, marked Exhibit X, but it was shown that plaintiffs had, of their own motion, dismissed s-id suit without a trial thereof on the merits before the trial of this cause.

The defendants Lehman, Durr and Company introduced in evidence a mortgage to them by Belser and Parker, a copy of which is hereto attached as part of this bill, marked Exhibit Y, and proved that it was duly executed upon its date and upon the considerations therein expressed, part of which was for money then paid or credit then given and an agreement to extend the other existing indebtedness, and that said mortgage was recorded as shown by the endorsements thereon, and that the debts secured by said mortgage were still unpaid, and that they had said machinery in their possession when it was sued for in this case, the possession being by their bailee, Crowell, one of the defendants, but that said machinery had since been sold.

The defendants Pollak and Co. introduced in evidence a mortgage to them from Belser and Parker, a copy of which is hereto attached as part of this bill, marked Exhibit Z, and proved that it was executed at its date upon the considerations expressed therein, which was in part for an indebtedness past due and then extended and new advances, and that it was recorded as shown by the endorsements thereon.

The evidence tended to show that certain parts of the machinery sued for had been furnished to Belser and Parker after the date of the said mortgage to Lehman, Durr and Co. on Dec. 4, 1885.

The foregoing was all the evidence, and thereupon the plaintiffs presented to the court and asked the court to give to the jury the several charges hereto attached as part of this bill marked 1 to 8, but the court severally refused to give each of said charges, and to each such refusal the plaintiffs duly excepted. Each of said charges was separately asked and separately refused and each refusal separately excepted to by the plaintiffs.

13 And thereupon the defendants asked the court to give to the jury the following written charge, to wit: "That if the jury believe the evidence they must find for the defendants," and this charge was given to the jury; and to the giving of this instruction to the jury the plaintiffs duly excepted.

And this is now signed and sealed as the plaintiffs' bill of exceptions, and is made a part of the record in term time, this 16th day of January, 1888.

JOHN BRUCE, *Judge.*

Filed the eight- day of May, A. D. 1888.

J. W. DIMMICK, *Clerk.*

EXHIBIT A TO BILL OF EXCEPTIONS.

L. C. Parker. E. B. Gray. S. S. Belser.

Parker, Gray and Belser, dealers in general merchandise.

MITCHELL'S STATION, ALA., *Mar.* 28, 1885.

Messrs. E. Van Winkle & Co., Atlanta, Ga.

GENTS: You will please ship to us, at Mitchell's Station, Ala., the following oil-mill machinery, to wit, for which we agree to pay you the sum of twelve thousand five hundred dollars ($12,500.00):

One sett of oil-mill machinery complete, with capacity to work thirty tons of cotton seed per day, as follows:

4 hydraulic presses.
4 steam-heaters.
2 hullers.
4 linters, feeders, and condensers.

All line and center shafting, all steam and oil pipes, all pulleys, hangers, &c.; one hydraulic pump of six plungers, one oil pump, one cake breaker & cake grinding mill, one sett of crushing rollers, one sett of separating machinery, all elevators and conveyors, three seventy-saw gins, with feeders and condensers; two cotton presses, all shafting for gins and presses, all pullies complete, all belting but main belt for oil mill, belting for gin-house not included—this to mean, in fact, all machinery and appurtenances necessary to operate an oil mill and gin-house of above-described capacity. It is agreed that you are to lay down the mach'y at Mitchell's Sta. and pay all freight and furnish the mechanics to erect the same; we to furnish all rough labor and board of men. We agree to pay you for machinery as follows:

$3,000.00 on receipt of bill of lading.

$4,750.00 (four thousand seven hundred and fifty dollars) on the first day of November ensuing, and like amount, $4,750.00, first day of March ensuing, with interest at 8% from date of starting mill.

Yours respect-, &c., &c., BELSER & PARKER.

EXHIBIT B.

PIKE ROAD, *May* 5, 1885.

Mess. E. Van Winkle & Co., Atlanta, Ga.

14 DEAR SIRS: When can we expect the machinery? Give careful attention to workmanship and latest improvements. We will have a heavy fight with the Montgomery O. Works, and wish you to see that they have no advantage in way of improved machinery over us. Look after latest improved ginneries, so as you can give us some ideas on that subject. The Montgomery Oil Works propose to gin for nothing. We wish to do the same and make money, so you see what we want.

Your- respectfully, BELSER AND PARKER.

EXHIBIT C.

PIKE ROAD, *May* 25, 1885.

Messrs. E. Van Winkle & Co., Atlanta, Ga.

DEAR SIRS: We wrote you a postal yesterday, but owing to haste on account of arrival of mail train did not explain fully cause of our not being able to receive machinery. Our mechanic's wife, who lives in Louisiana, was sick and he had to spend 2 weeks with her that should have been spent on the building. We would like you would defer shipment of machinery until, say, 8th next month, if you can. If you can't wait so long give us this week anyway. Come with machinery. We changed our bill of lumber and decided to build of dressed weather-boarding. This also caused some delay.

Very resp'y, BESLSER AND PARKER.

EXHIBIT E.

PIKE ROAD, *Aug.* 17, 1885.

Messrs. E. Van Winkle & Co., Atlanta, Ga.

DEAR SIRS: If you can rush our business any by putting more hands down here please do so, as we are very anxious to get ready by the 1st Sept., and at furthest the 10th. We can furnish all the help you need, and think that you might do work faster by having more hands. It would cost you less, as you could get your hands back to the shops sooner. Please come down yourself as soon as possible and talk with us about the ginnery at this place. Push the work as fast as possible.

Yours resp'y, BELSER AND PARKER.

EXHIBIT F.

PIKE ROAD, *Aug.* 27, 1885.

Messrs. E. Van Winkle & Co., Atlanta, Ga.

GENTLEMEN: Ginning has opened up and we are afraid that we will get badly crowded with seed. Please send down men and push the mill as fast as possible. Do your very best for us.

Very respectfully, BELSER & PARKER.

15 EXHIBIT G.

PIKE ROAD, *Sept.* 26, 1885.

Messrs. E. Van Winkle & Co., Atlanta, Ga.

DEAR SIRS: Your letter of yesterday received, which leaves — in a state of uncertainty about when we can start. We infer from it that starting at all depends upon Mr. Erbs' health. If everything is ready, ship at once; and if Mr. Erbs can't put it in, some one else must. We certainly blame you for the delay, as we were assured all along that we would be ready with the season. Our seed are

heating; besides we buy about $400.00 worth per day, and can't mix them with the spoiled seed. Every day's delay damages us $75.00. So please ship the goods and send men to start us up.

Respectfully, BELSER AND PARKER.

EXHIBIT H.

Messrs. E. Van Winkle & Co., Atlanta, Ga.

GENTLEMEN: The cake mill will not grind the output of the mill. No doubt that you have heard from Mr. Holley in regard to it. The cake is accumulating and we have filled all available space with it. You must help us out. Mr. Holley and Mr. Lodwidge thinks with the mill speeded up it might possibly answer.

Very respectfuoly, BELSER AND PARKER.

EXHIBIT I.

PIKE ROAD, ALA., *Nov.* 2, 1885.

Messrs. E. Van Winkle & Co., Atlanta, Ga.

DEAR SIRS: Yours of the 2nd inst., notifying us of sight draft, received and noted. In reply will say that from your statement in June, when we made first payment, that the oil-mill machinery, &c., was shipped, and that six weeks would suffice for starting up everything. We then thought that by starting with the season, as promised, that we would begin to realize something from the mill in time to meet this payment. As it is, we have not sold $1.00 worth of the proceeds of the mill. Under the circumstance you can't expect us to pay this amount. The mill is still not doing what it ought to do. The cake mill, as we have written you, does nothing scarcely, and all these things in connection has damaged us terribly.

Very truly, BELSER AND PARKER.

EXHIBIT J.

Nov. 2, 1885.

Messrs. E. Van Winkle & Co., Atlanta, Ga.

GENTLEMEN: The cake mill will not do as it is. Please
16 send us one that will or speed this up. Mr. Holley and Ludwidge think it might do if run about 800 revolutions per minute and plenty of belt surface—larger and stronger belts. If you could see inside the mill and how the cake is accumulating, you would arrange it. It now grinds about one-third the output. Give this your immediate attention.

Very respectfully, BELSER & PARKER.

EXHIBIT K.

MITCHELL'S, ALA., *Jan'y 6th*, 1886.

E. Van Winkle & Co.

GENTS: Please send us the mats as soon as possible. We have

received the last some week ago or more. We want a set for each press. Please attend to this at once & oblige,

Yours, &c., BELSER & PARKER.

W.

EXHIBIT L.

Telegram.

Received at 56 E. Wall St., Atlanta, Ga., 10 a. m.
Dated Pike Road, Ala., 7.

8, 7, 1885.

To E. Van Winkle & Co.

Come and bring your men immediately. Answer.

BELSER & PARKER.

EXHIBIT M.

PIKE ROAD, *May* 10, 1885.

Messrs. E. Van Winkle & Co., Atlanta, Ga.

GENTLEMEN: On account of sickness of Mr. Wilson's family (our carpenter) we have done but little in the last two weeks. Will push right ahead from now and think we will have the buildings ready in 30 days. We would like you come down before you ship. Will let you know about when we will expect you. Have made no changes. Will try and follow your plans exactly.

Very respectfully, BELSER AND PARKER.

EXHIBIT O.

ATLANTA, GA., *Nov.* 6, 1885.

Messrs. Belser and Parker, Pike Road.

DEAR SIR-: We were notified at bank to-day that you had refused to pay your payment due Nov. 1st on mill.

We were rather surprised at this, because you must not expect a mill can do good work on seed that were in the condition yours are. Now we have given you a good job; and as to the cake mill not grinding enough, we wrote Mr. Holley at once to speed it up, and if that was not fast enough would put in another mill that would be sufficient; but while the cake is so black and hard to run we did not expect it would keep up. Let us know what to expect and when. What you need and must have is a thorough and first-class man to take charge of your machinery. Not knowing any-
17 thing about the business yourselves, you must get a thorough man, and one that will give the mill close attention. A man cannot work in this business in a day nor a week. It requires a long experience. The most unfortunate part that I see is that your mill is located in such an unhealthy country, and it will be difficult to get a good man that will stay. If you prefer a burr-stone mill, we will put one in, but that should not affect you in making

this payment, as we have guaranteed the machinery if properly handled, and we are responsible.

Resp'y yours, E. VAN WINKLE & CO.

We had a bad time with your mill; everybody got sick that we sent there & one man will die. We have had to support him ever since he came back; have written to Cole, of Newnan, for burr-stone mill which we expect to ship this week to you.

18 EXHIBIT W.

THE STATE OF ALABAMA, }
Bullock County. }

E. VAN WINKLE & CO. }
vs.
BELSER & PARKER. }

Verified Statement, Mechanic's Lien.

Claim of lien under chap. 6, part 3, title 2, of the Code of Alabama (1876), sec. 3440 *et seq.*

This is to give notice that E. Van Winkle & Co., a copartnership composed of E. Van Winkle & W. W. Boyd, doing business in the city of Atlanta, Georgia, under the firm name and style of E. Van Winkle & Co., file this a verified statement of their demand with the judge of probate of Bullock county, Alabama, to secure the payment of the demand, hereinafter described, contracted for work done and machinery furnished for and about the erection, construction, and equipment of one of the leading divisions (viz., the erection and construction of the machinery of the oil mill and ginnery) of the building hereinafter described, the lien being claimed on the said hereinafter-described building and the land, belonging to the owners thereof, upon which the same is situated, including that part of the lot of land upon which such building is located and which is not covered thereby, as well as that part which such building does cover, to the extent of the right, title, and interest of the owners therein, as well as upon the machinery, fixtures, and appurtenances constituting the equipment of the building as an oil mill and ginnery, and set forth, 1st, that they, the said E. Van Winkle & Co., are the contractors, and Belser and Parker, a firm composed of Samuel S. Belser and Landon G. Parker, partners in trade, residing in Montgomery county and doing business under the firm name and style of Belser and Parker, are the owners of the property against which a lien is claimed, and that the work done and the machinery furnished by E. Van Winkle & Co was done and furnished under contract directly with said Belser and Parker.

That a true account of the demand due claimant is as follows:

2nd. That on or about the 25th day of March, 1885, E. Van Winkle & Company contracted with Belser and Parker to manufacture and erect for them at Mitchell's station, on the M. & E. R. R., in Bullock county, Alabama, in a building to be built by

said Belser & Parker for the purpose, the complete machinery of a cotton-seed oil mill of thirty tons capacity and certain ginning machinery as follows: 3, 70 saws each, Van Winkle gins, with self feeders and condensers; one cotton elevator for elevating cotton to gin; 2 Van Winkle cotton presses; 1 line shaft underneath gin-house for driving gins and presses, 2½ inches diameter, with pulleys, boxing, and couplings attached, also one line of shafting connecting between engine in oil-mill building to the line shaft underneath gin-house, with connecting boxing, bolts, and couplings (in the gin-house). In the two-story building called oil-mill building and attached sheds, viz: 1 main line of shaft on first floor, 3 and 2½ inches in diameter, with all connecting hangers, pulleys, couplings, bolts, and stringers, with belting connected to machines operated by this shaft; 4 Van Winkle cotton-seed oil presses; 4 Van Winkle steam-heaters with connecting frames, conveyors, shafting, pulleys, and belts attached; 48 steel-plated mats; 48 sheet-plated mats; 1 cake former; 1 cake compresser & attachments; 1 hydraulic pump, and connecting oil pipes to presses and belting for pump; one oil pump for tanks and connecting pipes; 1 iron oil
19 tank, 2 wooden oil tanks, 4 elevators and belting and connections from ground floor to second story, 1 cake-grinding mill (Nonpariel pattern, O. B.), 2 Van Winkle hullers, with connecting belting and conveyers; one sett crushing rollers, with connections and iron meal buckets; 1 cake-breaking machine and connections; 1 sand screen, with blower and shaker attachments in seed shed; all belting and pulleys connected with sand screen, 1 conveyer from sand screen to elevator on ground floor, all oil and steam pipes in building to heaters and tanks in second story, 4 Van Winkle cotton-seed linters, with self-feeders and condensers (80 saws each), with two iron conveyors and boxing attached for same, and all belting connected with linters & conveyors; one double-bolting reel, with two conveyers for seed and hulls, and attached pulleys and belting; pulleys, belting, and shafting connected with linters and separators in second story; 1 emory wheel, 4 setts hulling knives, and one 48 x 16 pulley on ground floor, with boxes and bolts attached, at and for the price of twelve thousand five hundred dollars, payable as follows: $3,000 on receipt of bill of lading, $4,750 on the 1st of November ensuing, and $4,750 on the first of March ensuing, the two last payments to draw interest from the day of starting the mill in operation. In pursuance of their contract said E. Van Winkle & Co. commenced the manufacture anerection of the machinery and appurtenances embraced in the contract, and worked on the same until finally completed, receiving and erecting the same until January 6th, 1886, when their contract was fully and finally completed; that during the construction of the machinery and its erection said Belser and Parker paid claimants the sum of two thousand five hundred dollars in money and paid freight for claimants on said machinery amounting to $500, which is admitted as a credit on the contract price; that on Dec. 11th, 1885, claimants and said Belser and Parker closed up the account of the indebtedness by the execution by Belser and Parker

of their three several promissory notes as follows: 1 for $1,500, due February 1st, 1886; 1 for $3,500, due March 1st, 1886; 1 for $4,633.52, due December 1st, 1886; each bearing interest from date; all of which are unpaid.

3rd. The property upon which the lien hereby sought to be enforced is intended to apply is the foregoing-described machinery and the building in which the same is contained, the fixtures and appu-tenances thereof, and the ground or lot of land upon which the same is located, correctly described as follows:

"That paart of the one and three-fourths acre lot of land, at Mitchell's station, Bullock county, Alabama, upon which the oil mill and ginnery of Belser & Parker is located, which one and three-fourths acre lot of land is bounded on the north by the Montgomery and Eufaula railroad track, on the east by the lands of Posey Pinkston, and on the south by the land of Posey Pinkston and J. C. Crow, being the land purchased by Belser and Parker from Posey Pinkston and T. M. Barnett, and upon which is located the oil mill, ginnery, store-house, and dwelling-house belonging to Belser and Parker.

E. VAN WINKLE & CO.

20 STATE OF ALABAMA, }
Montgomery County. }

Before me, D. H. Workman, a justice of the peace in and for said county, personally appeared E. Van Winkle, who, being duly sworn, says he is a member of the firm of E. Van Winkle & Co., the claimants in these proceedings, and has knowledge of the facts contained in the statement; that the matters and things set forth and contained in the foregoing statement are true and correct; that the same contains a true and correct account of the demand due after allowances of all just credits, a true description of the property (or so near as to identify the same) upon which the lien is intended to apply, together with the names of the contractors and owners of the building.

E. VAN WINKLE.

Sworn to and subscribed before me this the 27th day of April, 1886.

D. H. WORKMAN, *J. P.*

This verified statement and account received in office for filing and filed this first day of May, 1886, and abstract thereof containing the date of its filing, the name of the claimants, the amount of the claim, the name of the persons against whose property the lien is claimed, and the description of the property charged with the same entered in the record in my office marked Mechanics' Lien No. 1, pages three to six, inclusive.

I. B. FEAGIN,
Judge of Probate, Bullock County.

Received one dollar fee of E. Van Winkle & Co.

I. B. FEAGIN,
Judge of Probate.

21 EXHIBIT X.

STATE OF ALABAMA, }
Montgomery County. }

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon Samuel S. Belser and Landon G. Parker, partners in trade, using the firm name and style of Belser and Parker; Lehman, Durr and Co., & Pollak and Co. to appe-r at the next term of the circuit court to be held for said county, at the place for holding the same, then and there to answer the complaint of E. Van Winkle & W. W. Boyd, partners in trade, using the firm name and style of E. Van Winkle and Co.

Witness my hand this the 19th day of July, one thousand eight hundred and eighty-six.

E. R. HOLT, *Clerk.*

Complaint.

E. VAN WINKLE & Co., Partners in Trade, Composed of E. Van Winkle & W. W. Boyd, Using Such Firm Name and Style, Plaintiff-,

vs.

SAMUEL S. BELSER & LONDON G. PARKER, Partners in Trade, Using Firm Name and Style of Belser and Parker; Lehman, Durr & Co., & Pollak & Co., Defendants.

1. The plaintiffs claim of the defendants Belser and Parker the sum of ninety-five hundred dollars, balance due from them by account for work and labor done and machinery furnished for a building for said defendants by the plaintiffs at their instance and request, to wit, on the 6 day of January, A. D. 1886.

2. The plaintiffs claim of the defendants Belser and Parker the sum of ninety-five hundred dollars, balance due by said defendants by account for stationary machinery furnished and erected by plaintiffs as follows, to wit: "The complete machinery of a cotton-seed oil mill, thirty tons daily capacity, and certain ginning machinery, as follows: 3, 70 saws each, Van Winkle gins, with self-feeders and condensers; 1 cotton elevator for elevating cotton to gins, 2 Van Winkle cotton presses, 1 line of shafts underneath gin-house for driving gins and presses, 2½ in. diameter, with the pulleys, boxes, and *and* couplings attached; also line shafting connecting between engine and oil-mill building to line shaft underneath gin-house, with connecting boxes, belting, and couplings (in the gin-house). (In the two-story building called oil-mill building and attached sheds), 1 main line of shaft on the first floor, 3 & 2½ in. diameter, with all connecting hangers, pulleys, couplings, bolts, and stringers, with belting connected to machines operated by this shaft; 4 Van

Winkle cotton-seed oil presses, 4 Van Winkle steam-heaters, with connecting frames, conveyers, shafting, pulleys, and belts attached; 48 steel-plated mats, 48 sheet-plated mats, 1 cake-former, 1 cake former and compresser and attachments, 1 hydraulic pump and connecting oil pipes to presses and belting for pump, 1 oil pump for tanks and connecting pipes, 1 iron oil tank, 2 wooden oil tanks, 4 elevators and belting and connections from ground floor to second floor, 1 cake-grinding mill (Nonpareil pattern, O. B.), 2 Van Winkle hullers, with connecting belting and conveyers; 1 sett crushing rollers, with connections, and iron meal buckets; 1 cake-
22 breaking machine and connections, 1 sand screen, with blower and shaker attachment (in seed shed); all belting and pulleys connected with sand screen, 1 conveyer from sand screen to elevator on ground floor, all oil and steam pipes in building to heaters and tanks. (In second story), 4 Van Winkle cotton-seed linters, with self-feeders and condensers (80 saws each), with two iron conveyers and boxing attached for same and all belting connected with linters and conveyers; 1 double bolting reel, with two conveyers for seeds and hulls, and attached pulleys and belting; the pulleys, belting, and shafting connected with linters and separators in second story; 1 emory wheel, 4 setts hulling knives, & 48 x 16 pulley on ground floor, with boxes and bolts attached."

Which said machinery, plaintiffs aver, was furnished and erected by them as original contractors with said defendants, Belser and Parker, for the furnishing and erection of the same in the cotton-seed oil mill and ginnery of said defendants on the premises hereinafter described, under and by virtue of an original contract with said defendants, Belser & Parker, who were and are the owners of the land and premises hereinafter described; that all of said machinery was used by plaintiffs at the request of said defendants, Belser & Parker, under said contract for the erection and construction and equipment of the cotton-seed oil mill and ginnery of said defendants, which is located and situated as follows, to wit: On that lot or parcel of land at Mitchell station, Bullock county, Alabama, containing one and three-fourths acres, bounded on the north by the Montgomery and Eufaula railroad track, on the east by the lands of Posey Pinkston, and south by the lands of Posey Pinkston and J. C. Crow, being the lands purchased by Belser & Parker from Posey Pinkston and T. M. Barnett, and upon which is located the oil mill, store-house, and dwelling-house belonging to Belser and Parker.

3. The plaintiff- claims of the said defendants the further sum of five thousand dollars, with the interest thereon from the 11th day of December, 1885, due by their two several promissory notes executed on said day—one for fifteen hundred dollars, due and payable on the first day of February, 1886, and one for thirty-five hundred dollars, due and payable on the first day of March, 1886.

And plaintiffs aver that said sum of five thousand dollars is due from said defendants, Belser and Parker, for certain stationary machinery furnished and erected for them at their instance and request by the plaintiffs as original contractors to deliver and erect the same in a building then and now owned by said defendants, Belser and

Parker, which machinery is fully set out and described in the second count of this complaint. Said description is hereby referred to and adopted as a part of this count. Plaintiffs aver that said machinery was furnished and erected by them as original contractors, under and by virtue of a contract made with said defendants, Belser and Parker, by which the plaintiffs were to furnish and erect the same for said defendants in a certain building then and now owned by them; that said machinery was by virtue of said contract furnished and erected by *by* the plaintiffs in the building of said defendants, and went into the erection, equipment, and construction of the cotton-seed oil mill and ginnery of said defendants, which is located and situated as in the above and foregoing account stated.

23 Said description of said premises in count two of this declaration is hereby referred to and adopted as a part of this count.

And plaintiffs aver that within six months after the accrual of said indebtedness they filed with the judge of the probate of the county in which the property upon which a lien is sought to be established is situated a just and true account of the demand due them, after all allowances of all just credits, and a true description of the property, or so near as to identify the same, upon which plaintiffs' lien is intended to apply, with the name of the owner thereof and that of the contractors, which statement was duly verified by the oath of the plaintiff E. Van Winkle.

Plaintiffs now claim and move the court to declare a lien on said building and said improvements and the machinery so furnished, as well as upon the land upon which such building and improvements are situated, to the extent as in the statute named, for the payment of said claims, with the interest thereon, and that the court will order the same sold for the satisfaction thereof in the manner provided by the statute, provided defendants do not pay the same or it be not satisfied out of other property of said defendants. Plaintiffs aver that they and the said Belser and Parker are the only parties to said contract, but that Lehman, Durr and Co. and Pollak and Co. each claim to be interested in the subject-matter of this suit and in the property sought to be charged with the lien; they are made parties defendants.

ROQUEMORE, WHITE AND LONG,
Att'ys for Plaintiffs.

Plaintiffs being non-residents, we bind ourselves security for costs.
ROQUEMORE, WHITE AND LONG.

Received in office 21st day of July, 1886.
T. S. HERBERT, *Sheriff.*

Executed by serving a copy of the within summons and complaint on Joe Goetter, of the firm of Lehman, Durr and Co., on the 22nd day of July, 1886, and also on S. S. Belser and L. G. Parker, of the firm of Belser & Parker, on the 24th day of July, 1886, and

also on I. Pollak, of the firm of Pollak and Co., this 4th day of August, 1886.

T. S. HERBERT, *Sheriff.*
C. E. PARKS, *D. S.*

24 EXHIBIT Y.

Mortgage.

Samuel S. Belser, Q. V. Belser, Langdon C. Parker, & Alaice G. Parker
to
Lehman, Durr & Co.

STATE OF ALABAMA,
Montgomery County.

Know all men by these presents that whereas we, Belser & Parker, a partnership composed of Samuel S. Belser and Langdon C. Parker, are justly indebted to Lehman, Durr and Co. in the sum of thirty thousand dollars, with interest from date, due by a promissory note bearing even date — these presents, and due and payable on the 15th day of February, 1886, and are desirous of securing the payment of the same: Now, therefore, in consideration of the premises and for the purpose of securing the payment of said note and interest when the same falls due, we, the said Samuel S. Belser and Q. V. Belser, his wife, and the said Langdon C. Parker and Alice G. Parker, -is wife, have granted, bargained, and sold and conveyed, and by these presents grant, bargain, sell, and convey, to the said Lehman, Durr & Co. the following-described real and personal property, to wit, one and three-fourths acres of land situate at Mitchell's station, Bullock county, Alabama, bounded on the north by the Montgomery and Eufaula railroad track; on the east by the lands of Posey E. Pinkston; on the south by the lands of Posey E. Pinkston and J. C. Crowell, said lot being the same purchase- by us of C. A. Martin, Posey E. Pinkston, T. M. Barnett, and Walter L. Ross, and upon which is situated an oil mill, ginnery, store-house, and dwelling, together with all the gins, beltings, engines, boilers, and machinery of every character and description, whether stationary or movable; also one tract of land known as the "Crow place," containing eighty-eight acres of land, situate in Montgomery county, and being fully described in a deed executed by George M. Crow & F. E. Crow to said Belser and Parker on the 15-h day of December, 1883, and recorded in the office of the judge of probate of said county on the 11th day of Janu-ry, A. D. 1884, in Book of Deeds # 16, page 484; also the S. E. ¼ of section (4) four; S. E. ¼ of the S. W. ¼ of section (4) four; the N. E. ¼ of section (9) nine; the E. ½ of the S. E. ¼ of section (9) nine, all in township (14) fourteen, range 20, twenty, and the W. ½ of the N. W. ¼ of section (9) nine; S. W. ¼ of the S. W. ¼ of section (4) four, all in same township and range, less about (62) sixty-two acres heretofore sold to Ponder, said place being in Montgomery county, and is known as the "Thomas B.

Gregg place;" also about fifty head of mules now in use on our said places in Montgomery and Bullock counties, the same being all the mules — by us, the said Belser and Parker; also all the rents that may be due to us for the "Grigg place," "Crow place," and the "H. T. Graves place," the "C. L. Mathews place" and the "Pinkston place" and the "Gus. Smith place" & "Alford place" for the year 1886:

To have and to hold the aforegranted lands, personal property, and rents to and unto the said Lehman, Durr & Co, their heirs and assigns forever, and we, the said Samuel S. Belser and Q. V. Belser and the said Langdon C. Parker and Alice G. Parker, do, jointly and severally, for ourselves and each of us and for each of our heirs and legal representatives, covenant and agree to and with the said Lehman, Durr and Co., their heirs and assigns, that we are lawfully seized of an indefeasible estate in fee in said lands; that they are free from incumberances, and that we have a good and perfect right to sell and convey the same.

And we do further, for ourselves and each of us, for our and each of our heirs and legal representatives, jointly and severally, covenant and agree to and with the said Lehman, Durr & Co., their heirs and assigns, that we will forever warrant and defend the title to the property hereby conveyed against the lawful claims and demands of all persons whomsoever. And for the further purpose of the better securing said indebtedness, we, the said Belser and Parker, do hereby agree to keep the buildings upon said lot at Mitchell station insured for the benefit of Lehman, Durr and Co., their heirs and assigns, in the sum of — thousand dollars, and to keep said buildings and the machinery therein in good repair until the payment of said indebtednes- in full; to cause all taxes and assessments, general and special, upon any and all of the property hereby conveyed, to be paid whenever due and within the time required by law; and in case of any default in the payment of any such taxes or assessments, or in case of the failure to keep said property insured as herein agreed, we hereby authorize and empower the said Lehman, Durr & Co., their heirs or assigns, to pay off said taxes or assessments and to insure said property, and all amounts so expended by the said Lehman, Durr and Co. shall become a debt due additional to *to* the indebtedness hereby secured specially, and shall be secured in like manner as such indebtednes- by this mortgage, and shall be due and payable within thirty days after the same — paid out and expended by said Lehman, Durr & Co., their heirs and assigns. But this conveyance is intended to operate as a mortgage, and is upon the express condition that if the said note shall be well and truly paid, with interest thereon, when the same matures, and if the covenants aforesaid shall be well and truly kept and all the amounts expended as aforesaid shall be refunded and repaid, with interest, and within the time hereinbefore stipulated, to the said Lehman, Durr & Co., their heirs and assigns, then this conveyance shall be void and of no effect; but if default is made in the payment of said note and interest, or any part thereof, when the same shall fall due, or should we fail to refund to the said Lehman, Durr & Co., their heirs or assigns,

any sums of money expended by them in paying any taxes and assessments on said property or insuring the same, as hereinbefore provided, and within the time herein stipulated, then, in any one of said events, the whole of the indebtedness hereby secured shall become at once due and payable, and the said Lehman, Durr & Co. and their heirs and assigns, or John W. Durr or Joseph Goetter, who are members of said firm, or any person authorized by them or either of them, by endorsement on this mortgage, may enter upon said real estate hereby conveyed and seize and take possession of said personal property, or without entering upon said real property, and sell the same, at the Artesian basin, in the c-ty of Montgomery, Ala., at public outcry, to the highest bidder, for cash, first giving fifteen days' notice of the time, place, and terms of said sale by publication in some newspaper published in said city, ans shall apply the proceeds—

26 First, to the payment of the costs and expenses of said sale, including a reasonable attorney's fee for collecting said debt and foreclosing this mortgage;

Second, to the payment of said note and interest and of all amounts expended and paid out as aforesaid; and

Third, the balance, if any, shall be turned over to us, the said Belser and Parker.

And it is further understood and agreed that the said Lehman, Durr & Co., their heirs and assigns, or any member of said firm, may purchase said property at any sale had under the power contained in this mortgage; and in event of such firm, their heirs or assigns, or of any member of the firm, becoming the purchaser of such property or of any portion of it, we hereby authorize and empower the said John W. Durr or Joseph Goetter, or the person authorized by endorsement upon this mortgage as herein provided to make such sale, to execute to such purchaser a warranty deed in common form conveying to him the property so purchased, subject only to the right of redemption given by the statute laws of the State in the case of property sold under execution. It is further expressly understood and agreed that the acceptance of this mortgage is in no way to effect or impair any other security or lien which they, the said Lehman, Durr & Co., may now have for the *for the* security of the above-described indebtedness of any part thereof.

In witness whereof we have hereunto set our hands and affixed our seals this the 4th day of December, 1885.

SAMUEL S. BELSER. [SEAL.]
Q. V. BELSER. [SEAL.]
LANGDON C. PARKER. [SEAL.]
ALICE G. PARKER. [SEAL.]

Signed, sealed, and delivered in the presence of—

J. K. HARRIS.
J. D. LOGUE.

THE STATE OF ALABAMA, }
—— *County.* }

I, Henry C. Moses, a notary public in and for said county and State, hereby certify that J. K. Harris, a subscribing witness to the foregoing conveyance, known to me, appeared before me this day, and, being sworn, stated that Samuel S. Belser, Q. V. Belser, Langdon C. Parker, and Alice G. Parker, the grantors in the conveyance, voluntarily executed the same in his presence and in the presence of the other subscribing witness on the day the same bears date; that he attested the same in the presence of the grantors and of the other witness, and that such other witness subscribed his name as a witness in his presence.

Given under my hand this eight- day of December, 1885.

H. C. MOSES,
Notary Public.

THE STATE OF ALABAMA, }
Montgomery County. }

OFFICE OF THE JUDGE OF PROBATE.

I hereby certify that *that* the within mortgage was filed in this office for record on the third day of February, 1886, at 3 o'clock p. m., and duly recorded in Book 80 of Mortgages, page 192, and examined.

F. C. RANDOLPH,
Judge of Probate, Montgomery County.

27 EXHIBIT Z.

Mortgage.

THE STATE OF ALABAMA, }
Montgomery County. }

Belser and Parker }
to }
Pollak & Co. }

This deed of mortgage, made and entered into on the second day of January, 1886, between Belser and Parker, party of the first part, of the county of Montgomery and State of Alabama, and Pollak and Co., of the second part, of the county of Montgomery and State of Alabama, witnesseth:

That the party of the first part, being indebted to the party of the second part in the sum of fifteen thousand dollars, evidenced by their promissory notes bearing even date with this instrument, each for three thousand dollars, payable to order of Pollak and Co., at Bank of Farley, Spear and Co., Montgomery, on the first day of October, 15th day of October, and first day of November, 15th day of November, and first day of Dec., 1886, respectively, and being desirious of securing the payment of the same, in consideration thereof and the further consideration of the sum of five dollars to *him* in

hand paid before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, have bargained, sold, and conveyed, and by these presents do bargain, sell, and convey, to the said party of the second part the property hereinafter described—that is to say, situated in the county of Montgomery, in the State of Alabama, and more particularly known as the Gregg plantation, to wit, S. E. ¼ of section 4, S. E. ¼ of the S. W. ¼ of sec. 4, N. E. ¼ of sec. 9, E. ½ of N. W. ¼ of sec. 9, E. ½ of S. E. ¼ of sec. 9, all in town. 14, range 20; W. ½ of N. W. ¼ of sec. 9, S. W. ¼ of S. W. ¼ of sec. 4, all in town. 14, range 20, less about sixty acres sold therefrom—to one Ponder, with the improvements and appurtenances thereunto belonging; also W. ½ of S. W. ¼, sec. 2, town. 13, range 20, conatining about 80 acres; also one lot or parcel of land lying and being situate in the northwest corner of the northwest quarter of the N. W. ¼, sec. 11, town. 13, range 20, said lands bounded as follows: Commencing at northwest corner of said section 11, running east 280 yards along Greenwood road, then running south 140 yards, thence west 280 yards, thence north 140 y-rds back to place of commencement, containing about eight acres, together with all improvements thereon and appurtenances thereunto belonging, otherwise known as the George Crow place; also one and three-quarters (1¾) acres of land in the town of Mitchells, Bullock county, Alabama, bounded north by M. & E. R. R. track, east by the lands of Mrs. Pinkston, south by the lands of Mrs. Pinkston and J. C. Crowell, and on the west by lands of said Crowell, and purchased from Ross, Martin & Bronson, T. M. Barnett, & Posey E. Pinkston (on which are located and erected an oil mill, steam-ginnery, store-house, and dwelling), together with all the improvements thereon and all appurtenances thereunto belonging; also fifty (50) mules and horses, 1 jack, 10 two-horse wagon-, 10 buggies, twenty cows and calves; also 2,000 bushels of corn; also all crops grown on the W. B. Mathews plantation, the Gus. Smith plantation, and Gregg plantation, all in Montgomery county, of every kind, character, and discription; also two gins, one engine, and boiler on the Mathews plantation; to have and to hold to the said the party of the second part, his heirs and assigns forever; but this deed is intended to operate as a mortgage and is subject to the following conditions—that is to say: That if the party of the first part shall pay and satisfy the debt above described at the time or before the same or any part thereof
28 falls due, then this conveyance to be null and of no effect; but on default of such payment, then the said party of the second part may take the above-described property into their possession, may, without having the same in their possession, sell the same to the highest bidder, at public auction, at Montgomery, in the State of Alabama, for cash, having advertised said sale in some newspaper published in said city of Montgomery for thirty days by weekly insertions, and shall ap-ly the proceeds to the payment of the expenses incident to said sale and the payment in full of said demand and pay over the remainder to the said party of the first part.

In testimony whereof we, Belser and Parker, the party of the first

part, have hereunto set our hands and affixed our seals the day and year above written.

BELSER & PARKER. [L. S.]

Signed, sealed, and delivered in the presence of—
ARIOSTO A. WILEY.
GEORGE GOODWIN.

THE STATE OF ALABAMA, }
Montgomery County. }

I, H. C. Moses, a notary public, hereby certify that Ariosto A. Wiley, a subscribing witness to the foregoing conveyance, known to me, appeared before me on this day and, being sworn, stated that Belser and Parker, the grantors in the conveyance, voluntarily executed the same in his presence and in the presence of the other subscribing witness on the day the same bears date, and that such other witness subscribed his name as a witness in *the* presence.

Given under my hand this seventh day of January, 1886.

H. C. MOSES,
Notary Public.

Received this 4th day of February, 1886, and recorded in volume 82, page 229, and examined.

F. C. RANDOLPH,
Judge of Probate.

Charges Asked by the Plaintiff- and Refused.

1. That if the evidence shows that the complainants were the manufac-urers of the machinery in question that would constitute them the owners until by some complete act of sale the title passed to some other person.

And there is no complete act of sale until there has been, between the buyer and the seller, a full agreement of their minds on the part of the vendor to part with his ownership of the property and of the vendee (or buyer) to accept and receive the property as a full compliance on the part of the seller of his agreement.

When this agreement of the minds of the buyer and the seller takes place in any given instance is a question of intention to be determined by a consideration of the situation and surroundings of the parties and the subject-matter of the contract and the stipulations to be observed and performed by the parties with respect thereto.

29 The burden of showing satisfactorily that the title has passed from the original owner to a buyer rests upon the buyer if he affirms that a sale has taken place, and when the contract is for articles (to be manufactured or for articles in existence at the date of the contract) with or about which the seller, under the terms of the contract, was to do something to put them in such condition as he could insist upon an acceptance by the buyer, or, as is commonly

said, in a deliverable state, the property does not pass from the vendor to the vendee unless it is shown satisfactorily that there was a specific intent of the parties that it should do so contrary to the ordinary course of business. The presumption is against such intent under such circumstances and must be shown by the party asserting it.

2. "In a case of doubt the construction which the parties themselves have put upon a contract is of great assistance in arriving at its true meaning."

If the contract in this instance was for the purchase of certain cotton-seed oil-mill machinery as a complete mill, which was to be transported to a given place and to be put up by the vendor, or for the putting up of which he was to do anything, such as furnishing mechanics, &c., and which machinery was to be of a given capacity, the presumption of law would be that the property would not pass from the vendor until the latter had completed the mill as a whole and the vendee had unconditionally accepted it as a fulfilment of the contract; and such acceptance must be notified to the vendor. The doing of secret or fraudulent acts by the vendee in transactions with third persons which might estop him from saying he was not the owner as against the person with whom he dealt would have no operation whatever against the vendor; and in this case the making of the mortgage by Belser and Parker to Lehman, Durr & Co. cannot be regarded as of any force as evidence to show the necessary agreement of the minds of E. Van Wi-kle & Co. & Belser & Parker as to the relinquishment of the right of the property by one and the full acceptance of the property by the other as a compliance with the contract; and until such mutual agreement of the minds of the vendor and vendee is shown the property would remain with the vendor, notwithstanding the buyer should in the meantime execute mortgages or make absolute sales of the property. In such case the vendee cannot alone elect to regard the property as passing, and certainly not by any secret or perhaps fraudulent act. The vendor must also agree to the relinquishment of his right of property, which right may be of importance to the vendor to secure the performance of contemporaneous acts to be done by the buyer, such as making payments falling due before the contract has been fully completed.

3. In the present instance no right of property passed to the vendee (Belser & Parker) at the time of making the contract. The contract itself contemplated certain things to be done by both the buyer and the seller before any property could pass under the contract to the buyer, and the law is (unless a specific intent is shown to the contrary by the party alleging it) that the property will not in such cases pass until each party has done all that the contract requires to be done before the property is in that condition in which it may be tendered as a full compliance with the contract, and there must be such a tender or delivery of the property to the buyer and such full acceptance by the buyer, and such acceptance and tender cannot in either case be by secret acts. The law comtemplates notice to each party and the mutual

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assent of their minds to act of relinquishment of the property by the vendor and its acquirement by the buyer.

4. The payment of installments prior to or during the progress of the acts to be done by either or both of the parties before the property is in a deliverable state under the contract is not inconsistent with the retention of the property in thee vendor.

5. When machinery is to be put up on the premises of the buyer and is to be of a certain quality or capacity under the terms of the contract, the possession and use of the machinery by the buyer, with the consent of the seller, for the purpose of testing its quality or capacity prior to the full acceptance of the machinery as a compliance with the contract and the relinquishment of the verdor's right of the property, is not inconsistent with the property being with the vendor, notwithstanding such possession. Neither party would be estopped by such a possession.

6. That the jury are to determine under all the evidence whose property the machinery in question was by mutual understanding of Belser and Parker & E. Van Winkle & Co. up to the 11th of Dec., 1885, and if they find that up to that time there was no mutual agreement or understanding between them whereby it vested in Belser and Parker, or that they (Belser & P-rker) refused to accept it as a fulfillment of the contract up to that time and only accepted it at that time and then gave the plaintiffs the notes in evidence, the plaintiffs' right is superior to that of Lehman, Durr & Co. and to that of any of the defendants.

7. That the plaintiffs are entitled to recover such property as was furnished after the 11th of Dec., 1885.

8. That it is a question of intention of the parties as to when the property in the machinery passed to Belser and Parker, and the jury are the judges as to when they both intended that it should pass, and if they believe that they did not so mutually intend that it should pass until the settlement and adjustment on the 11th of Dec., 1885, the plaintiffs' rights are superior to those of Lehman, Durr and Co. and to those of any of the defendants.

Filed the 8th day of May, A. D. 1888.

J. W. DIMMICK, *Clerk.*

32 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judge of the circuit court of the United States for the middle district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between E. Van Winkle & Company and Canty Crowell, Lehman, Durr & Co., and Pollak & Company, a manifest error hath happened, to the great damage of the said E. Van Winkle & Company, as by their complaint appears, we, being willing that

error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, *chief* justice of
[SEAL.] the said Supreme Court, the 31 day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

J. W. DIMMICK,
Clerk of the Circuit Court of the United States
for the Middle District of Alabama.

Allowed by—
JOHN BRUCE, *Judge.*

Appeal Bond.

Know all men by these presents that we, E. Van Winkle & Co., are held and firmly bound unto Canty Crowell, Lehman, Durr and Company, & Pollak & Co. in the full and just sum of five hundred dollars, to be paid to the said Canty Crowell, Lehman, Durr & Co., and Pollak & Co., their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a circuit court of the United States in and for the middle district of Alabama, in a suit depending in said court between E. Van Winkle & Co. and the said Canty Crowell, Lehman, Durr & Co., and Pollak and Company, a judgment was rendered against the said E. Van Winkle & Co., and the said E. Van Winkle & Co. having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Canty Crowell,
Lehman, Durr & Co., and Pollak & Co., citing and admonish-
33 ing them to be and appe-r at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the conditoon- of the above obligation are such that if the said E. Van Winkle and Company shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void; else to remain in full force and virtue.

E. VAN WINKLE & CO. [SEAL.]
FARLEY, SPEAR & CO. [SEAL.]

Sealed and delivered in the presence of—

—— ——.

Approved by—
JOHN BRUCE, *Judge.*

Citation.

THE UNITED STATES OF AMERICA:

To Canty Crowell, Lehman, Durr & Company, and Pollak & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein E. Van Winkle & Co. are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiffs in error in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. S. F. Miller, *chief* justice of the Supreme Court of the United States, this 31st day of May, in the year of our [SEAL.] Lord one thousand eight hundred and eighty-eight.

JOHN BRUCE, *Judge.*

On this 13th day of August, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared before me the subscriber, Robert H. Sommerville, deputy United States marshal for the middle district of Alabama, and makes oath that he delivered a true copy of the within citation to Alex. Troy, Esq., a member of the law firm of Tompkins, London and Troy, solicitors of record of the defendants, Canty Crowell, Lehman, Durr & Co., and Pollak & Co., this 13th day of August, 1888.

R. H. SOMMERVILLE,
Dep-ty U. S. Marshal, Mid. Dist. of Ala.

Sworn to and subscribed the 13th day of August, A. D. 1888.

BENJ. P. SEALS,
U. S. Commissioner, Mid. Dist. of Ala., &
Dep. Clerk of said Court for said District.

34 UNITED STATES OF AMERICA, }
Middle District of Alabama, } *ss:*

I, J. W. Dimmick, clerk of the circuit court of the United States in and for the middle district of Alabama, in the fifth judicial circuit, do hereby certify that the foregoing pages, numbered from 1 to 33,

both inclusive, contain a full, true, and complete transcript of the record and proceedings in a case lately depending in said circuit court, wherein E. Van Winkle and Company were plaintiffs and Canty Crowell and others — defendants, as the same appear of record and on file in my office as such clerk.

Seal of the United States Circuit Court, Middle District of Alabama.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said district, this 1st day of September, A. D. 1888.

J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

I further certify that pleas were filed by defendants Lehman, Durr & Co. and Pollak & Co., but after the trial all the papers were taken out of my office by plaintiffs' attorneys, for the purpose of preparing bill of exceptions, and have been mislaid, and for that reason are not embraced in the foregoing transcript.

J. W. DIMMICK, *Clerk, &c.*

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the middle district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between E. Van Winkle & Company & Canty Crowell, Lehman, Durr & Co., and Pollak & Company, a manifest error hath happened, to the great damage of the said E. Van Winkle & Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court, Middle District of Alabama.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the 31st day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

J. W. DIMMICK,
Clerk of the Circuit Court of the United States for the Middle District of Alabama.

Allowed by—
JOHN BRUCE, *Judge.*

36 THE UNITED STATES OF AMERICA:

To Canty Crowell, Lehman, Durr & Company, and Pollak & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein E. Van Winkle & Company are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this 31 day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

{Seal of the United States Circuit Court, Middle District of Alabama.}

JOHN BRUCE, *Judge.*

37 On this 13th day of August, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared before me, the subscriber, Robert H. Sommerville, deputy United States marshal for the middle district of Alabama, and makes oath that he delivered a true copy of the within citation to Alex. Troy, Esq., a member of the law firm of Tompkins, London & Troy, solicitors of record of the def'ts, Canty Crowell, Lehman, Durr & Co., & Pollak & Co., this 13th day of August, 1888.

R. H. SOMMERVILLE,
Dep. U. S. Marshal, Mid. Dis. Ala.

Sworn to and subscribed the 13th day of August, A. D. 1888.

BENJ. P. SEALS,
U. S. Commissioner, Mid. Dist. of Alabama, &
Dep. Clerk U. S. Cir. Court for said District.

38 Supreme Court of the United States.

E. VAN WINKLE & Co., Appellants,
vs.
CANTY CROWELL *et als.*, Appellees.
} Of October Term, in the Year of Our Lord 1888.

Afterwards, to wit, on the first Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said E. Van Winkle & Co., by their attorney, Wm. A. Gunter, and say that in the record & proceedings aforesaid there is manifest error, in this, to wit:

1. That the evidence of the witness E. Van Winkle that the machinery in question was not, prior to its inspection & the settle-

ment in Dec., 1885, turned over to Belser & Parker nor accepted by them as a compliance with the contract, & that they then only accepted it conditionally upon appellants supplying & changing certain parts of the machinery, was, on motion of defendants, excluded from the jury.

2. That the evidence of the same witness that the machinery in question was manufactured under a guarantee & that he
39 permitted its operation by Belser & Parker to test it was, on motion of defendants, excluded from the jury.

3. That the evidence of the same witness and of the witness Belser that under the terms of the contract for the machinery Van Winkle & Co. were to erect the same was, on motion of the defendants, excluded from the jury.

4. That the charge to the jury asked by appellants and marked 1 was refused.

5. That the court refused to give to the jury appellants' charge marked 2.

6. That the court refused to give to the jury appellants' charge marked 3.

7. That the court refused to give to the jury appellants' charge marked 4.

8. That the court refused to give to the jury appellants' charge marked 5.

9. That the court refused to give to the jury appellant's charge marked 6.

10. That the court refused to give to the jury appellants' charge marked 7.

11. That the court refused to give to the jury appellants' charge marked 8.

12. That the court gave to the jury the within charge asked by the defendants.

40 And the said E. Van Winkle and Company pray that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by occasion of said judgment.

W. A. GUNTER,
Attorney for Plaintiffs in Error.

41 [Endorsed:] Sup. Court U. S., 1888, Oct'r term. No. 1366. E. Van Winkle & Co., pl'ffs in error, *vs.* Cantey Crowell *et al.* Assignment of errors.

[Stamped:] Office Supreme Court U. S. Filed Nov. 8, 1888. James H. McKenney, clerk.

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Supreme Court of United States,

OCTOBER TERM. 1891.

No. 260.

VAN WINKLE & CO., PLAINTIFFS IN ERROR,

vs.

CANTY CROWELL, LEHMAN, DURR & CO., ET ALS.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

By W. A. GUNTER and JNO. D. ROQUEMORE.

Supreme Court of United States,

OCTOBER TERM, 1891.

No. 260.

VAN WINKLE & CO., PLAINTIFFS IN ERROR,

vs.

CANTY CROWELL, LEHMAN, DURR & CO., ET ALS.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

Plaintiffs in error, being manufacturers of mill machinery at Atlanta, Georgia, on the 28th March, 1885, contracted with Belser & Parker, a firm doing business at Pike Road, near Montgomery, Ala., to manufacture and erect for them at Mitchell's Station, Ala., all the machinery and appurtenances necessary to operate an oil mill and gin house of capacity to work thirty tons of cotton seed per day.

Record, p. 10.

On the completion and acceptance of the machinery after erection, Van Winkle & Co. took notes from Belser & Parker on 11th December, 1885, for deferred payments, in each of which was the recital that: "The above is for purchase-money of one cotton seed oil mill machinery built at Mitchell's Station, Ala., which E. Van Winkle & Co. have this day agreed to sell to Messrs. Belser & Parker, of Pike Road, Ala.; and it is the express condition of the delivering of the said property that the title to the same does not pass from E. Van Winkle & Co. until the purchase-money and interest

is paid in full." The notes not being paid, the vendors brought this suit in detinue for the machinery against Crowell, who was in possession as bailee of Lehman, Durr & Co. and Pollak & Co., both of whom by consent appeared and defended as mortgagees of Belser & Parker.—Rec. 11, 12.

The order taken for the machinery is shown on page 15 of record, and is substantially as follows:

"Messrs. E. Van Winkle & Co., Atlanta, Ga.: Gents—You will please ship to us, at Mitchell's Station, Ala., the following oil machinery, to-wit, for which we agree to pay you the sum of twelve thousand five hundred dollars: one set of oil mill machinery complete, with capacity to work thirty tons of cotton seed per day as follows:"

(Specifying certain machinery.)

"This to mean, in fact, all machinery and appurtenances necessary to operate an oil mill and gin house of above described capacity. It is agreed that you are to lay down the machinery at Mitchell's Station, and pay all freight and furnish the mechanics to erect the same; we to furnish all rough labor and board of men. We agree to pay you for machinery as follows:

$3,000 on receipt of bill lading, $4,750 (four thousand seven hundred and fifty dollars) on the first day of November ensuing, and like amount, $4,750, first day of March ensuing, with interest at 8 per cent. from date of starting mill. BELSER & PARKER."

The evidence as to mode of attachment of machinery to the realty was conflicting; that of the plaintiffs below tended to show that all or a large part of the machinery was either held in place by screws easily and without damage taken out, or simply kept in place by its own weight, and with cleats nailed to the floor around its base to prevent sliding, but there was also evidence that most of it was nailed to the floor of the house. It was admitted, however, that it was all suitable and intended for the operation of a cotton seed

oil mill, and that the building was erected for that purpose, but could be used for other purposes.

Rec. p. 13.

The mortgage of Lehman, Durr & Co., was given by Belser & Parker on the 4th December, 1885, and covered the real estate on which said mill was situated and the machinery thereon, and was for a consideration in part passing at the time of the mortgage. The mortgage to Pollak & Co. covering same property was taken upon like consideration, on the 2d January, 1886, and the law day of both mortgages was passed before the commencement of the suit by plaintiff in error, and the mortgagees were in possession by their bailee.

Rec. p. 14.

The court gave the general charge in favor of the defendants, holding that under the contract the property in the machinery vested in the purchasers as it was shipped, and that it passed under the mortgages.

The court also rejected certain charges asked by plaintiffs in error founded upon the idea that the property in the machinery did not pass from vendors until the acceptance and settlement on the 11th December, 1885, and then only conditionally upon the payment of the purchase-money. And certain evidence offered by plaintiffs in error was rejected as shown below.

ERRORS ASSIGNED.

1. The plaintiffs in error having shown that the notes given for the purchase of the machinery were given and taken after an inspection of it with them by Belser & Parker, and a settlement on 11th December, 1885, in which the vendors agreed to supply certain new machinery and change other parts (Record, pages 11 and 12), testified through the witness Van Winkle:

"That his firm never did turn over said cotton seed oil mill machinery to said Belser & Parker (otherwise than by

shipping the machinery, and by permitting Belser & Parker to operate the same), until upon said settlement after said inspection in December, 1885; and that Belser & Parker did not prior thereto accept said cotton seed oil mill machinery as a compliance with the contract, and then only accepted it conditionally upon plaintiffs supplying and changing certain parts of the machinery."

Record, 12–3.

But this evidence was, on motion of defendants in error, excluded from the jury.—T. 13. And this action of the court is assigned as error.

II.

That the court excluded the testimony of the same witness, Van Winkle, "that the machinery was manufactured under a guarantee, and that he permitted its operation by Belser & Parker in order that it might be fully tested."

Rec. 13.

III.

That the court excluded the testimony of the same witness, and also one of the firm of Belser & Parker, to the effect:

"That under the terms of the contract for the machinery Van Winkle & Co. were to erect the same."

Record 13.

IV.

That the court refused to give to the jury the charge, No. one, in these words:

"That if the evidence shows that the complainants were the manufacturers of the machinery in question, that would constitute them the owners, until by some complete act of sale the title passed to some other person. And there is no complete act of sale until there has been, between the buyer and the seller, a full agreement of their minds, on the part of the vendor to part with his ownership of the property,

and of the vendee (or buyer) to accept and receive the property as a full compliance on the part of the seller of his agreement. When this agreement of the minds of the buyer and the seller takes place in any given instance, is a question of intention, to be determined by a consideration of the situation and surroundings of the parties and the subject-matter of the contract, and the stipulations to be observed and performed by the parties with respect thereto. The burden of showing satisfactorily that the title has passed from the original owner to a buyer, rests upon the buyer if he affirms that a sale has taken place, and when the contract is for articles (to be manufactured or for articles in existence at the date of the contract) with or about which the seller, under the terms of the contract, was to do something to put them in such condition as he could insist upon an acceptance by the buyer, or, as is commonly said, in a deliverable state, the property does not pass from the vendor to the vendee, unless it is shown satisfactorily that there was a specific intent of the parties that it should do so contrary to the ordinary course of business. The presumption is against such intent, under such circumstances, and must be shown by the party asserting it."

Record 30–1.

V.

That the court refused to give to the jury the charge number two (Record 31) in these words:

"In a case of doubt, the construction which the parties themselves have put upon a contract is of great assistance in arriving at its true meaning. If the contract in this instance was for the purchase of certain cotton-seed oil-mill machinery as a complete mill, which was to be transported to a given place and to be put up by the vendor, or for the putting up of which he was to do anything, such as furnishing mechanics, &c., and which machinery was to be of a given capacity, the presumption of law would be that the property would not pass from the vendor until the latter

had completed the mill as a whole and the vendee had unconditionally accepted it as a fulfillment of the contract; and such acceptance must be notified to the vendor. The doing of secret or fraudulent acts by the vendee in transactions with third persons which might estop him from saying he was not the owner as against the person with whom he dealt, would have no operation whatever against the vendor; and, in this case, the making of the mortgage by Belser & Parker to Lehman, Durr & Co. can not be regarded as of any force as evidence to show the necessary agreement of the minds of E. Van Winkle & Co., and Belser & Parker, as to the relinquishment of the right of property by the one and the full acceptance of the property by the other as a compliance with the contract; and until such mutual agreement of the minds of the vendor and vendee is shown, the property would remain with the vendor, notwithstanding the buyer should, in the meantime, execute mortgages or make absolute sales of the property. In such case the vendee can not alone elect to regard the property as passing, and certainly not by any secret or perhaps fraudulent act. The vendor must also agree to the relinquishment of his right of property, which may be of importance to the vendor to secure the performance of cotemporaneous acts to be done by the buyer, such as making payments falling due before the contract has been fully completed."

VI.

That the court refused to give to the jury the charge number three (Record 31) in these words:

"In the present instance no right of property passed to the vendee (Belser & Parker) at the time of making the contract. The contract itself contemplated certain things to be done by both the buyer and the seller before any property could pass under the contract to the buyer, and the law is (unless a specific intent is shown to the contrary by the party alleging it) that the property will not, in such cases, pass until each party has done all that the contract

requires to be done before the property is in that condition in which it may be tendered as a full compliance with the contract, and there must be such a tender or delivery of the property to the buyer and such acceptance by the buyer; and such acceptance and tender can not, in either case, be by secret acts. The law contemplates notice to each party, and the mutual assent of their minds to the act of relinquishment of the property by the vendor and its acquirement by the buyer."

Record 31–2.

VII.

That the court refused to give to the jury the charge numbered four (Record 32) in these words:

"The payment of installments prior to or during the progress of the acts to be done by either or both of the parties before the property is in a deliverable state, under the contract, is not inconsistent with the retention of the property in the vendor."

Record 32.

VIII.

That the court refused to give to the jury the charge numbered five (Record 32) in these words:

"When machinery is to be put on the premises of the buyer, and is to be of a certain quality or capacity under the terms of the contract, the possession and use of the machinery by the buyer, with the consent of the seller, for the purpose of testing its quality or capacity prior to the full acceptance of the machinery as a compliance with the contract and the relinquishment of the vendor's right of property, is not inconsistent with the property being with the vendor, notwithstanding such possession. Neither party would be estopped by such a possession."

Record 32.

IX.

That the court refused to give to the jury the charge number six, in these words—(Rec. 32):

"That the jury are to determine under all the evidence whose property the machinery in question was by mutual understanding of Belser & Parker, and E. Van Winkle & Co., up to the 11th Dec., 1885, and if they find that up to that time there was no mutal agreement or understanding between them whereby it vested in Belser and Parker, or that they (Belser & Parker) refused to accept it as a fulfilment of the contract up to that time, and only accepted it at that time, and then gave the plaintiffs the notes in evidence, the plaintiffs' right is superior to that of Lehman, Durr & Co., and to that of any of the defendants."—Rec. 32.

X.

That the court refused to give to the jury the charge number seven in these words:

"That the plainliffs are entitled to recover such property as was furnished after the 11th December, 1885."—Rec. 32.

XI.

That the court refused to give to the jury the charge number eight (Rec. 32,) in these words:

"That it is a question of intention of the parties as to when the property in the machinery passed to Belser & Parker, and the jury are the judges as to when they both intended that it should pass, and if they believe that they did not so mutually intend that it should pass until the statement and adjustment on the 11th of December, 1885, the plaintiffs' rights are superior to those of Lehman, Durr & Co., and to those of any of the defendants."—Rec. 32.

XII.

That the court charged the jury in these words:

"That if the jury believe the evidence they must find for the defendants."—Rec. 14.

ARGUMENT.

The property sued for was personal. There was evidence (Rec. 13) tending to show that it had no such attachment to the land as to make it a part of the realty, which, of course, on the unqualified direction given to the jury to find for the defendants (Record 14), must be taken as true in favor of the plaintiffs in error.

But, independently of this, the rule is that personal property does not become realty even in favor of mortgagees or purchasers if the agreements between the vendor of the personalty and the owner of the land preserves as between them, its character as personalty, as was the case in this instance.

Ford v. Cobb, 20 N. Y., 344.
Russell v. Richards, 1 Fairf. 429; S. C. 25 Am. Dec. 254.
Hendy v. Dinkerhoff, 40 Am. Rep. 107.
Tift v. Horton, 53 N. Y., 377.
Sisson v. Hibbard, 75 N. Y. 542.
Globe Marble Co. v. Quinn, 76 N. Y., 23.
Foster v. Mabe, 4 Ala. 402.
Harris v. Powers, 57 Ala. 144.

To sustain the direction to the jury, too, the parol evidence offered by plaintiffs in error, tending to show that the machinery was never turned over to Belser and Parker nor accepted by them under the contract, until the adjustment and settlement on the 11th December, 1885, and the evidence explaining the possession by Belser & Parker, must either appear to have been properly excluded or immaterial if admitted and found by the jury to be true.

(Record, pp. 12–13).

That this evidence was improperly excluded from the jury appears to be evident. The written order (Record, 15) given by Belser & Parker was a mere proposition; it did

not contain the contract on the part of Van Winkle & Co., and as there was no writing showing it, parol evidence was the only source of information open.

But even if the order expressed the whole arrangement and contract, it is plain that it would be competent to prove by parol, when the machinery was accepted by the purchasers as their property and that it had the conditions stipulated for in the contract, and likewise to explain the character of the possession prior to acceptance by the vendees.

No specific machinery was bought so as to pass the property, but it was all to be manufactured, and was to be a "complete sett," and to possess the capacity of working thirty tons of cotton seed per day.—(Rec. 15). These "conditions" necessarily operated to retain the property in the vendors until the vendees *accepted* the machinery, with the vendors' consent, as their property.

Notwithstanding the machinery may have been exactly conformable to the stipulations of the contract, it would not, under such agreement, belong to the vendees until there was a meeting of the minds of the vendors and vendees on the point of tender by one and acceptance by the other. And this, notwithstanding the possession of the machinery may prior thereto have been with the vendees.

Pope v. Allis, 116 U. S. pp. 371–2.
Norrington v. Wright, *ib.* 188.
Filley v. Pope, *ib.* 213.
Cleveland v. Rolling Mill, 121 U. S. 255.
Benj. on Sales, § 1348–9.
Lead. Cases in Eq. Vol. 11, p. 30, (ed. 1879).

There was an unqualified right therefore, on the part of the plaintiffs in error, to show by parol when there was an actual acceptance of the property in the goods by the vendees, and to explain the character and purpose of their prior possession. And the court evidently committed an error in denying this right.

The charge in favor of the defendants below might, however, still be free from error, if the evidence excluded could

not, if admitted and found true, with the other evidence in the case, have warranted a verdict for the plaintiffs.

The argument must then proceed upon the hypothesis of the admission and truth of all the evidence offered in behalf of the plaintiffs in error. And on this basis the proposition is this:

Can a vendee, before tender and relinquishment of property by the vendor and before any notice to the vendor of acceptance, mortgage the property of the vendor on the premises of the vendee and in his possession for test and experiment, pending the consummation of a sale?

It looks almost like disrespect to the court to argue the affirmative of such a proposition. The property was personal. The legal title was still in the vendor. Whoever buys property must at his peril take notice of the legal title. There is no such doctrine known to the law as that of giving a mere possessor of personal property a right to convey a greater interest than he himself has.

Shaw v. R. R. Co. 101 U. S. 565-6.

2 Kent Com. [324].

Fairbanks v. Eureka Co. 67 Ala. 112-3.

The mortgage to Lehman, Durr & Co. being made on the 4th December, 1885, prior to the passing of the property in the machinery to Belser & Parker, which took place on the 11th December, 1885, gave no right against the plaintiffs in error and was no defense to their action.

The mortgage to Pollak & Co., in January, 1886, after Belser & Parker had acquired the conditional title, dependent, upon the payment of the purchase-money to the plaintiffs in error, gave them only the title of Belser & Parker. There is no such thing as a *bona fide* purchase of personal property so as to defeat the legal title.

Fairbanks v. Eureka Co. 67 Ala. 109.

Heinbockle v. Zugbaum, 51 Am. Rep. 59.

Sumner v. Woods, 67 Ala. 139.

Marvin v. Norton, 57 Am. Rep. 566, and note.

Harkness v. Russell, 118 U. S. 663.
Telegraph Co. v. Davenport, 97 U. S. 372.
Fosdick v. Schall, 99 U. S. 235.
Cole v. Berry, 36 Am. Rep. 511.
2 Kent Com. 498.
Benj. on Sales, § 425 and 437.

The charge given by the lower court to find for the defendants was, therefore, erroneous, unless the fact that the vendors prior to the commencement of this suit claimed a mechanics lien and sought to establish the lien by proceedings in court (Record, 14–19–20), deprives them of all right to claim the property sued for. It seems that no such consequence can be attributed to that proceeding. There is no estoppel by judgment, for the proceeding was dismissed by plaintiffs in error voluntarily without trial. And there is no estoppel *in pais* in it, since it does not appear that the defendants were induced to act thereon, or that they have in any way acted thereon to their prejudice.

At most, it is a mere circumstance tending to show that plaintiffs in error at that time thought they were entitled to a mechanics lien for a part or all of the debt. But this mistaken version of the contract cannot alter the legal construction which the laws of Alabama impute to the writings.

Fairbanks v. Eureka Co. 67 Ala. 109.
Sumner v. Woods, 67 Ala. 139.

But independently of this a large part of the debt was for money expended and work and labor done in erecting the machinery. The evidence shows that the plaintiffs in error were builders, as well as sellers of machinery—that they were to furnish and pay mechanics to erect the mill, &c., for which they might well be entitled to a mechanics lien, notwithstanding a recovery of the machinery itself.

Code of Ala. (1886) § 3018.

The attempt to secure a mechanics lien, if antagonistic to the rights asserted in this suit, never having matured

into an estoppel, did not, it seems, afford any justification to the unqualified direction of the lower court to find for the defendants.

In reference to the several charges asked by plaintiffs in error and refused by the court, which are set out in extenso above, and also found on pages 30-1-2 of the record, very little need be said, as the principles involved are elementary and have been somewhat considered above in the discussion of the general charge of the court.

The first charge (Record, 30) simply asserts that the manufacturer of goods owns them until he has consented to part with them, and the buyer has accepted them as his property, and that the presumption is against the property passing to a buyer, in the absence of a specific agreement showing such intent, until goods are in condition to be tendered as a compliance with the contract. Nothing could be plainer than this.

Pope v. Allis, 115 U. S. *supra.*

The second charge (Record, 31) asserting the same idea, goes no further than to say, that a buyer cannot accept secretly, as by a fraudulent act of selling or mortgaging the property. It takes two to make a bargain, and the vendor is a necessary party to the transaction.

The third charge (Record, 31-2) is identical in principle with the first and second.

The fourth (Record, 32) says a man may pay on a contract without acquiring any property in specific goods.

The fifth (Record, 32) asserts that a manufacturer may turn over the possession for testing and experiment without relinquishing his property, and that a buyer may have such possession without waiving his right to refuse the goods as not having the conditions stipulated for. Surely, this is plain enough.

The sixth (Record, 32) asserts that if the minds of the vendor and vendee did not meet until 11th December, 1885, on the passing of the property in the machinery, and that

then the property passed under the terms of the notes given therefor, the plaintiffs' rights were superior to those of the mortgagees. This point has already been considered.

The eighth charge, in legal effect, is the same as the sixth (Record, 32).

It thus appears that the lower court erred to the prejudice of the plaintiffs in error in its rulings upon the evidence, and in the charge given and in those refused.

W. A. Guntis

J. D. Raymon Attys

for Plff in Error

146 U.S. 142

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Supreme Court of United States.

OCTOBER TERM, 1891.

No. 260.

VAN WINKLE & CO.,

PLAINTIFFS IN ERROR,

vs.

CANTY CROWELL, LEHMAN, DURR & CO., et als.

DEFENDANTS IN ERROR.

Brief and Argument for Defendants in Error.

H. C. TOMPKINS.

The Alabama Printing Co., Montgomery, Ala.

Supreme Court of the United States,

OCTOBER TERM, 1891, No. 260.

E. Van Winkle & Company,
Plaintiffs in Error,
vs.
Canty Crowell, et als,
Defendants in Error.

In error to the Circuit of the United States for the Middle District of Alabama.

Brief and argument of H. C. Tompkins, Attorney for Defendants in Error.

STATEMENT OF THE CASE.

The action was *detinue* brought in the Circuit Court of the State and removed to the Circuit Court of the United States for the recovery of certain machinery belonging to and constituting a cotton seed oil mill.

The action was originally brought against defendant Crowell, but after its removal to the United States Circuit Court, defendants Lehman, Durr & Company and Pollak & Company were allowed, without objection, to come in and make themselves parties defendant and to file pleas. The controversy was in fact a controversy between Van Winkle & Company on the one part, and Lehman, Durr & Company and Pollak & Company on the other part. The defendant firms each claimed under mortgages executed by Belser & Parker, Crowell being, at the time the suit was brought against him, in possession of the property as their bailee.

On March 28th, 1885, one of the plaintiffs visited Belser & Parker and sold them the machinery and appurtenances necessary to operate an oil mill of thirty tons capacity a day. The contract was in writing in the form of an order on plaintiffs signed by said Belser & Parker, a copy of which is found on page 15 of the record. This order was written by the member of plaintiffs' firm who negotiated the sale, was signed by Belser & Parker and delivered to that member, who accepted the same for his firm. There was no other agreement than the one contained in the order. The member of plaintiffs' firm who wrote the order and accepted it testified that he made no other agreement.

SEE RECORD, PAGE 11.

The order given by Belser & Parker and accepted by plaintiffs bound the latter, 1st, To ship to the former the machinery named therein; 2nd, To pay the freight thereon to the railroad station to which it was to be shipped; and, 3rd, To furnish the mechanics for the erection of the machinery.

Belser & Parker on their part agreed, 1st, To furnish all rough labor and to board the men engaged in work; and, 2nd, To pay $12,500 for the machinery, $3,000 on the receipt of the bill of lading, $4,750 on November 1st, 1885, and $4,750 on March 1st, 1886. Various letters were introduced in evidence which established that there was great delay in shipping the machinery and much complaint on the part of Belser & Parker, but they show nothing which has any bearing on this case. The building in which the machinery was placed was erected by Belser & Parker after the order was given, and was constructed for the purpose of being used as a cotton seed oil mill, and the machinery furnished was such as was essential for such a mill and none other. The machinery was manufactured by plaintiffs in Atlanta, Ga., and was placed by them at various dates on the cars at that place consigned to Belser & Par-

ker. At different times during the shipments plaintiffs drew drafts on Belser & Parker amounting in the aggregate to $2,500 which were paid. Besides that, Belser & Parker paid out for freights and other expenses, which plaintiff agreed to pay, different sums amounting to about $500. The machinery was erected so that the mill could be operated prior to December 1st, 1885, and Belser & Parker commenced operating it in the month of November, 1885. There was some evidence that after December 10th, 1885, plaintiffs supplied some little additional machinery, but the evidence did not show what it was, did not identify it. The land on which the building, in which the machinery was placed, stood belonged to Belser & Parker.

On December 4th, 1885, Belser & Parker being then indebted to Lehman, Durr & Company, and the debts being then due, obtained an extension from them and also obtained from them further advances, making the total indebtedness $30,000, and, to secure this indebtedness, on the same day executed to said Lehman, Durr & Company a mortgage on certain property including the cotton seed oil mill, land, buildings and machinery. This mortgage was recorded in the proper office on the 3rd day of February, 1886, within three months after its execution.

SEE RECORD, PAGES 14, 25-28.

On January 2nd, 1886, Belser & Parker, to secure certain debts then due, the payment of which was extended, and to secure certain advances then made, executed and delivered to Pollak & Company a mortgage upon the land containing the cotton seed oil mill together with all the improvements thereon and all the appurtenances thereunto belonging. Defendants claimed title through their mortgages.

On the 11th day of December, 1885, one of the plaintiffs again visited Belser & Parker and with one of the members of the latter firm inspected the mill. It was agreed be-

tween them that certain additional parts of machinery should be provided and other portions changed; what parts was not shown. Then Belser & Parker agreed that the balance due for the machinery should be settled by three notes payable February 16th, March 1st, and December 1st, 1886, which were executed. The notes recited that they were given for the purchase money of this machinery. In those notes are to be found these words, "And it is the express condition of the delivering of the said property that the title to the same does not pass from E. Van Winkle & Company until the purchase money and interest is paid in full." On the title given by these notes plaintiffs relied for the recovery of the property. As stated above, every part of the machinery, except some few pieces that were not pointed out by the evidence, had been received and was in use by Belser & Parker prior to December 1st, and no work was done on the mill or machinery after the last mentioned date.

ARGUMENT.

The evidence excluded, that Van Winkle & Company did not turn the machinery over to Belser & Parker until December 11th, that it was manufactured under a guaranty but they were permitted to use it for the purpose of testing it, and that under the terms of the contract Van Winkle & Company were to erect the machinery, was clearly illegal It will be noticed that it was testified by Van Winkle, that he made no contract with Belser & Parker except the one contained in the written order. That contained no guaranty except the implied guaranty that the machinery should be reasonably fit for the purposes and uses for which it was sold. It contained an express direction to ship the machinery to Belser & Parker at Mitchell's Station, Ala., and it contained an express provision that Van Winkle & Company were to furnish a specified part of the force to be used in erecting the machinery, not that they were to erect it or

even to control its erection. Van Winkle & Company were never in possession of the mill and therefore could not turn it over. Whether the possession and title to the machinery had vested in them prior to the 4th day of December, 1885, was a conclusion of law to be drawn from the undisputed facts, for the facts were not disputed, and the witness could not testify to that conclusion. The contract contained no stipulation that Belser & Parker were to be allowed to test the machinery, nor did it, as above said, provide that plaintiffs should erect it. But even if it had contained these provisions, they would have been for the benefit of Belser & Parker and they could have waived them. They had a right to accept the machinery without testing it and before its erection, and plaintiffs had no right to insist that they should not accept it until after these things were done. Whenever Belser & Parker did an act showing that they had waived these things and accepted the machinery, the title to it at once vested in them, and as to innocent purchasers, it could not be revested in the sellers. They could not have done any act which showed an acceptance more emphatically than the sale of it as their property. Even before the sale they used and operated it as their property.

1 Benjamin on Sales, § 144. & 2 2d § 387-8

Tiedeman on Sales, §§ 115, 216-17.

Chaplain vs. Rogers, 1 East 195.

Day vs. Pool, 52 N. Y. 719.

Kimball &c., Co. vs. Vroman, 35 Mich. 558.

Delwitt vs Berry 134 U. S. 306. Gibson vs Stevens 8 How. 384

Under the contract the title to the machinery passed to Belser & Parker as soon as it was placed on the cars consigned to them.

1 Benjamin on Sales, § 181.

Green vs. Brien, 8 How. 429.

Lawrence vs. Minturn, 17 How. 100.

Pilgreen vs. The State, 71 Ala. 368.

Belser & Parker, by transferring the bill of lading to Lehman, Durr & Co., would have transferred the title to the property to them; *a fortiori* by transferring the property itself after its receipt from the carrier they vested in them the legal title to it.

The Telegraph vs. Gordon, 14 Wall 258.

Conard vs. Atlantic Ins. Co., 1 Peters 386.

It is not pretended that either Lehman, Durr & Co. or Pollak & Co. had any notice that plaintiffs in error had any title to the property; and undisputed evidence shows each one of those firms to have been purchasers for value; hence they were *bona fide* purchasers. They parted with value *in præsenti* and gave extensions on debts then due.

Rogers vs. Adams, 66 Ala. 600.

Craft vs. Russell, 67 Ala. 9.

The machinery was sold for the specific purpose of being placed in the building which Belser & Parker were to erect for the purpose of being used as a cotton seed oil mill on land to which they held the legal title. All of it was essential to such a mill. It would not have been a complete mill without it. This being the case, it became a part of the realty and passed with a sale of the mill, although it may not have been fastened to the soil.

Voorhees vs. McGinnis, 48 N. Y. 278.

Morris' Appeal, 88 Penn. St. 368, 383.

Voorhees vs. Freeman, 2 W. & S. 116.

Robertson vs. Corsett, 39 Mich. 777.

Walmsley vs. Milne, 17 Eng. C. L. 114.

Shelton vs. Ficklin, 32 Gratt. 727.

Green vs. Phillips, 26 Gratt. 752.

McRea vs. Central, &c., Bank, 66 N. Y. 489.

The Ottumwa, &c., Co., vs. Hawley, 44 Iowa 57.
Parsons vs. Copeland, 38 Me. 537.
Smith Paper Co. vs. Servin, 130 Mass. 511.
Thomas vs. Davis, 76 Mo. 72.
Allen vs. Woodard, 125 Mass. 400.
McConnell vs. Blood, 123 Mass. 47, 49.
Southbridge Bank vs. Exeter, &c., Works, 127 Mass. 542.
Brennan vs. Whitaker, 15 Ohio St. 446.
Winslow vs. The Mer. Ins. Co., 4 Met. 306.

Under the statutes of Alabama Lehman, Durr & Co. had three months within which to record their mortgage.
Code of Ala. of 1876, §2166.

The whole question here, however, so far as the rights of Lehman, Durr & Co. are concerned, depends upon whether or no the title to this machinery was in Belser & Parker on the 4th day of December, when that mortgage was executed.

The notes gave no title that related back to a date prior to their execution. The evidence does not show that a word was ever said by any of the parties about a retention of the title prior to December 11th, 1885. Giving to those notes the most favorable construction they constitute only a mortgage.

Heryford vs. Davis, 102 U. S. 235.
Wright vs. Vaughn, 45 Vt. 369.

But plaintiffs must have been entitled to recover against all of the defendants or they could not recover at all. The judgment could not have been divided. They were not

entitled to a judgment against Crowell, because he held as bailee of both Lehman, Durr & Co. and Pollak & Co. If the title of either was better than that of plaintiffs, then Crowell was not wrongfully detaining the property, and the gist of the action was that he wrongfully detained the property at the time suit was brought.

Henderson vs. Felts, 58 Ala. 590.

Lightfoot vs. Jordan, 63 Ala. 224.

Plaintiffs in error never had the notes vesting the title in them recorded, and there is no evidence that Pollak & Co. had any notice of their claim at the time they took their mortgage, consequently that mortgage divested whatever title plaintiffs may have had.

Section 2170 of the Code of Alabama of 1876, then and now in force, reads as follows:

"§2170 (1561). *Conveyance of personal property to secure debts, &c, inoperative as to certain persons, until recorded; time for recording when property is brought to the state; when removed to another county.*—Conveyances of personal property to secure debts, or to provide indemnity, are inoperative against creditors, and purchasers without notice, until recorded, unless the property is brought into this state, subject to such incumbrances,in which case four months are allowed for the registration of the conveyance; and if such property is removed to a different county from that in which the grantor resides, the conveyance must be recorded in such county, within six months from the removal, or it ceases to have effect after such six months, against the creditors or purchasers of the grantor, without notice."

Construed in Pollak vs. Davidson, 87 Ala. 551.

Plaintiffs in error when they filed a lien against the property treated it as the property of Belser & Parker.

This they did after taking the notes, and thereby abandoned any claim they had to assert title to the property, a lien against, being the assertion of a right inconsistent with a title to, property. Having once elected to proceed to condemn the property as that of Belser & Parker, they could not revoke that election and treat it as their property.

Leinkauf vs. Forcheimer, 87 Ala. 258.
Morris vs. Rexford, 18 N. Y. 552.
Rodemund vs. Clark, 46 N. Y. 354.
Moller vs. Tuska, 87 N. Y. 165.
Butler vs. Hildreth, 5 Met. 49.
Bulkley vs. Morgan, 46 Conn. 394.
Brinley vs. Tibbetts, 7 Greenl. 70.
Bailey & Harvey, 135 Mass. 172.
Dibble vs. Sheldreth, 10 Blatchf. 178.
Nield vs. Burton, 49 Mich. 53.
Gray vs. St. John, 35 Ills. 222.

Here the plaintiffs in error had two rights—one to treat the sale as rescinded and take possession of the property, in which case the debt from Belser & Parker became extinguished; the other was to treat the sale as unconditional and seek to enforce the lien given them by the laws of Alabama, not only on the machinery but on the buildings and land. This is conceding that they had never parted with the title to the property. Under no circumstances could their rights have been greater. They elected to assert the latter right and even went so far as to institute proceedings to enforce the lien by condemning this property and those proceedings were pending at the time the action in the case at bar was instituted.

Under the evidence the court was justified in giving the affirmative charge. Conceding that plaintiffs might have been entitled to recover the articles furnished after December 4th, the burden was upon them of showing what articles were received after that date—to identify them so that the jury might return a verdict for the particular articles. They did not introduce any evidence from which the jury could identify them, did not show which of the articles were delivered after that date, therefore they were not entitled to recover such articles.

Pollak vs. Brush, &c., Ass. 128 U. S. 447.

Goodlett vs. L. & N. R. R. Co. 122 U. S. 391.

Respectfully submitted,

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